

OHIO VALLEY ENVIRONMENTAL COALITION, et al., Plaintiffs, v. MARIANNE LAMONT HORINKO,
Acting Administrator, United States Environmental Protection Agency, Defendant.
CIVIL ACTION NO. 3:02-0059

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, HUNTINGTON
DIVISION

2003 U.S. Dist. LEXIS 15359

August 29, 2003, Decided
August 29, 2003, Entered

PRIOR HISTORY: *Ohio Valley Envtl. Coalition v. Whitman*, 2003 U.S. Dist. LEXIS 148 (S.D. W. Va., Jan. 6, 2003)

DISPOSITION: [*1] Plaintiffs' motion for summary judgment was granted and motions for summary judgment filed by EPA and defendant-intervenors were denied. EPA's approval of West Virginia's antidegradation procedures was vacated and remanded to EPA for further proceedings consistent with this opinion.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff environmental coalition and others (collectively, coalition) sued defendant Acting Administrator of the United States Environmental Protection Agency (EPA), challenging the EPA's decision under § 303(c) of the Clean Water Act, 33 U.S.C.S. § 1313(c), to approve the State of West Virginia's antidegradation implementation procedures. The parties cross-moved for summary judgment.

OVERVIEW: The state's antidegradation implementation procedures were designed to prevent the degradation of the state's waters. The court found that the EPA acted arbitrarily and capriciously in approving the antidegradation procedures. With respect to seven particular aspects of the state's program, the EPA failed to ensure that the state's procedures met minimum federal requirements, as defined by the Act and the EPA's own regulations. In some instances, there was insufficient evidence in the administrative record to support aspects of the state's implementation procedures and, correspondingly, the EPA's approval of those procedures. For example, there was not sufficient evidence in the record explaining how tier 2 review, which was location-specific and requires public participation, could be done at the time a general §§ 402 or 404 of the Act, 33 U.S.C.S. § 1342, 1344, permit was issued, rather than at the time new individual discharges

were proposed. In other instances, the state's regulations failed to require the minimum protections required by the EPA's regulations. However, the EPA's conclusion that six aspects of the procedures satisfied minimum federal requirements was reasonable.

OUTCOME: The court granted the coalition's motion and denied the EPA's motion.

CORE TERMS: water, tier, water quality, regulation, antidegradation, pollutant, segment, degradation, assimilative, de minimis, parameter, river, nonpoint, trading, minimis, reduction, cumulative, loading, high quality, decrease, classification, exemption, stream, reasonable interpretation, arbitrary and capricious, deference, body-by-water, pollution, public participation, chemical

LexisNexis (TM) HEADNOTES - Core Concepts:

Environmental Law: Water Quality
Administrative Law: Judicial Review: Standards of Review: Standards Generally
[HN1] The court reviews the Environmental Protection Agency's (EPA) decision to approve a state's antidegradation implementation procedures only to ensure that the approval was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C.S. § 706(2)(A). This standard of review is narrow, and a court is not to substitute its judgment for that of the agency. That said, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. Under the arbitrary and capricious standard, the court presumes the validity of agency action, and the court's job is simply to scrutinize the agency's activity to discern whether the record reveals that a rational basis exists for the agency's decision.

Administrative Law: Judicial Review: Standards of Review: Standards Generally

Administrative Law: Agency Rulemaking: Rule Application & Interpretation

[HN2] When reviewing a federal agency's interpretation of a statute that it administers, the court first asks whether Congress has directly spoken to the precise question at issue. If the court can discern Congress's intent by using traditional tools of statutory construction, the court must give effect to that intent. On the other hand, if the statute is silent or ambiguous about the issue, the court must defer to the agency's reasonable construction of the statute. This analytical approach applies not only when a regulation is directly challenged, but also when a particular agency action is challenged. The court also defers to the agency's reasonable interpretation of its regulations, unless that interpretation is plainly erroneous or inconsistent with the regulation.

Administrative Law: Judicial Review: Standards of Review: Substantial Evidence Review

[HN3] As for an agency's factual findings, the court should accept the agency's factual findings if those findings are supported by substantial evidence on the record as a whole, even if there are alternative findings that could be supported by substantial evidence. Particular deference is given by the court to an agency with regard to scientific matters in its area of technical expertise.

Civil Procedure: Summary Judgment: Burdens of Production & Proof

Civil Procedure: Summary Judgment: Summary Judgment Standard

[HN4] To obtain summary judgment, the moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). This court will accept the an agency's factual findings if those findings are supported by substantial evidence on the record as a whole. If the administrative record does reveal some genuine issue of material fact - that is, if the evidence in the administrative record could reasonably support different factual conclusions - the court defers to the agency's reasonable resolution of that factual question. To put it another way, when a court reviews an agency action, the plaintiff's burden on summary judgment is not materially different from his ultimate burden on the merits.

Civil Procedure: Justiciability: Case or Controversy

[HN5] See U.S. Const. art. III, § 2.

Civil Procedure: Justiciability: Case or Controversy

[HN6] Among other things, the "case and controversy" requirement ensures that the federal judicial power can

be exercised only when a plaintiff has standing to bring suit. The standing inquiry ensures that a plaintiff has a sufficient personal stake in a dispute to render judicial resolution appropriate. Because Article III standing is a jurisdictional requirement, the court must satisfy itself of a plaintiff's standing regardless of whether any party has raised the issue. To demonstrate Article III standing, a plaintiff must show (1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. In the environmental litigation context, the standing requirements are not onerous.

Civil Procedure: Justiciability: Standing

[HN7] The actual or threatened injury required by Article III of the United States Constitution, U.S. Const. art. III, may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing. That is to say, Congress may, by statute, create cognizable legal interests, the injury of which suffices for Article III standing.

Environmental Law: Water Quality

[HN8] The Clean Water Act (Act) is not concerned solely with protecting existing uses of the nation's waters. The Act is intended to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C.S. § 1251(a). In addition to protecting wildlife and recreation, § 1251(a)(2), the Act seeks to eliminate the discharge of pollutants into the navigable waters. § 1251(a)(1). These provisions make clear that the Act is not concerned solely with the uses of waters, but also with the quality of waters.

Civil Procedure: Justiciability: Standing

[HN9] Environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.

Environmental Law: Water Quality

[HN10] The Environmental Protection Agency's (EPA) regulations give states some discretion in how they identify waters as tier 2 waters. 40 C.F.R. § 131.12(a)(2), the regulation establishing the Tier 2 designation, does not include specific guidelines for identifying high quality waters. Various EPA guidance documents make a variety of suggestions concerning approaches to defining tier 2 waters, and states and tribes have developed various ways to identify tier 2 waters. In particular, the various approaches to classifying waters fall into two

basic categories: (1) pollutant-by-pollutant approaches; and (2) water body-by-water body approaches.

Environmental Law: Water Quality

[HN11] Under the pollutant-by-pollutant approach to classifying waters, the state makes a classification for each pollutant in a given water body. The water body is classified as tier 2 for those pollutants for which water quality is better than applicable criteria. The same water body therefore could be classified as tier 2 for certain pollutants and tier 1 for other pollutants: available assimilative capacity for any given pollutant is always subject to tier 2 protection, regardless of whether the criteria for other pollutants are satisfied. Under the water body-by-water body approach, states weigh a variety of factors to judge a water body segment's overall quality. Tier 2 classification is based on the overall quality of the water body segment, not on individual pollutants.

Environmental Law: Water Quality

[HN12] The Environmental Protection Agency's regulations place limits on the degree to which a state may exclude some waters from heightened protection so as to devote more resources to higher quality waters. For example, under the three-tier system established in *40 C.F.R. § 131.12*, a state could not relegate all waters to tier 1 classification other than waters of national and state parks and wildlife refuges and waters of exceptional recreational or ecological significance. *§ 131.12(a)(3)*. Even though such a decision would undoubtedly allow the state to devote many more resources to preserving its most important waters (its tier 3 waters), the regulations do not permit the state to accomplish this goal by denying tier 2 protection to deserving high quality waters (as defined by *§ 131.12(a)(2)*).

Environmental Law: Water Quality

[HN13] Section 303(d) of the Clean Water Act requires states to submit to the Environmental Protection Agency a list of waters that fail to meet water quality standards for at least one pollutant parameter. *33 U.S.C.S. § 1313(d)*.

Environmental Law: Water Quality

[HN14] Tier 2 review is required when an activity on a tier 2 water body threatens to lower the existing water quality. *40 C.F.R. § 131.12(a)(2)*. The mention of "existing point sources," in contrast, appears in the latter part of *§ 131.12(a)(2)*, which sets out the substance of tier 2 review. When tier 2 review is triggered, a lowering of water quality is permissible only after a process of public comment and a finding that the degradation is necessary to accommodate important economic or social development in that area. *§ 131.12(a)(2)*. But even when the state allows such degradation or lower water quality, the state shall assure that there shall be achieved the

highest statutory and regulatory requirements for all new and existing point sources and cost-effective and reasonable best management practices for nonpoint source control. In other words, even after public participation and a finding of necessity, a new or expanded use is permitted to degrade water quality only when the state assures that all other new and existing point sources are achieving the highest regulatory requirements and that nonpoint sources are controlled by best management practices. The reference to new and existing point sources does not refer to when tier 2 review is required, but refers to what the state must assure as to other sources before it will permit additional discharge from a new or expanded source.

Environmental Law: Water Quality

[HN15] See *40 C.F.R. § 131.3(e)*.

Environmental Law: Water Quality

[HN16] The main reference to "existing uses" in the Environmental Protection Agency's (EPA) antidegradation policy is in tier 1, which provides that existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected. *40 C.F.R. § 131.12(a)(1)*. The term "existing uses" is not used to establish when tier 2 review is required. Rather, the regulation provides that where the quality of the waters exceed levels necessary to support wildlife and recreation in and on the water, that quality shall be maintained and protected. *§ 131.12(a)(2)*. The present tense use of the verb "exceed" suggests that tier 2 protections apply to current water quality levels, not to any levels that have existed on or after 1975.

Administrative Law: Judicial Review: Standards of Review: Standards Generally

Administrative Law: Agency Rulemaking: Rule Application & Interpretation

[HN17] A reviewing court must defer to an agency's reasonable interpretation of the statute the agency is authorized to administer or one of the agency's own regulations. Judicial deference to an agency's reasonable interpretations of governing law is based in part on the notion that when Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Judicial deference is also based on an acknowledgment that the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.

Environmental Law: Water Quality

Administrative Law: Judicial Review: Standards of Review: Standards Generally

[HN18] The court owes judicial deference to the Environmental Protection Agency's (EPA) interpretations of the Clean Water Act and its own regulations in part because Congress has charged the EPA with administering those laws. That said, judicial deference to agency decisionmaking is not based solely on the fact that the agency is charged with administering the statute or regulation in question. The second justification for judicial deference is that the regulation in question falls within a complex area of particularized agency expertise.

Administrative Law: Judicial Review: Standards of Review: Standards Generally

Administrative Law: Agency Rulemaking: Rule Application & Interpretation

[HN19] The court should defer to a federal agency's reasonable interpretation of a state regulation, but the agency is not permitted to effectively amend the regulation to give it a meaning that the text of the regulation does not fairly support.

Administrative Law: Agency Rulemaking: Rule Application & Interpretation

[HN20] Inherent in the notion of an agency's discretion to interpret its own regulations is the idea that an agency may adopt any one of various reasonable interpretations of that regulation. An agency's prior choice of one reasonable interpretation does not preclude the agency from reconsidering its position in light of its ongoing experience and accumulated knowledge and adopting another reasonable interpretation.

Environmental Law: Water Quality

[HN21] Under *40 C.F.R. § 131.12(a)(2)*, water quality cannot be lowered unless doing so is necessary to accommodate important economic or social development in the area in which the waters are located. This standard, by its terms, is location-specific. When a general permit is issued under §§ 402 or 404 of the Clean Water Act, *33 U.S.C.S. § 1342*, 1344, the state simply does not know the specific locations of discharges that might be covered by the general permit; discharge locations are not known until individuals seek permission to discharge under the general permit.

Administrative Law: Judicial Review: Standards of Review: Standards Generally

Administrative Law: Agency Rulemaking: Rule Application & Interpretation

[HN22] An agency's revised interpretation deserves deference because an initial agency interpretation is not instantly carved in stone. Nonetheless, there is at least a presumption that an agency's policies will be carried out best if the settled rule is adhered to. As such, an agency

must justify its change of interpretation with a reasoned analysis for that change.

Environmental Law: Water Quality

[HN23] The Clean Water Act defines a "point source" as any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. *33 U.S.C.S. § 1362(14)*. A "nonpoint source," in contrast, is unchanneled and uncollected surface runoff. In the Clean Water Act, Congress consciously distinguished between point source and nonpoint source discharges, giving Environmental Protection Agency authority under the Clean Water Act to regulate only the former.

Environmental Law: Water Quality

[HN24] Environmental Protection Agency regulations indirectly place certain limits on nonpoint source pollution. Under tier 2, water quality may be lowered after a process of public participation and a determination that allowing lower water quality is necessary for important economic or social development. Even when this is the case, however, there are additional conditions that must be met before water quality in a tier 2 water may be lowered. Among other things, the state shall assure that there shall be achieved all cost-effective and reasonable best management practices for nonpoint source control. *40 C.F.R. § 131.12(a)(2)*. Thus, states are not required to regulate nonpoint source control, but if a state does not assure that best management practices are achieved for nonpoint source control, the state cannot permit the lowering of water quality from point sources on any tier 2 water, economic or social necessity notwithstanding.

Environmental Law: Water Quality

[HN25] See *33 U.S.C.S. § 1313(c)(2)(B)*.

Environmental Law: Water Quality

[HN26] *40 C.F.R. § 131.12(a)(2)* does not require tier 2 prior to allowing any lowering of water quality. Rather, § 131.12(a)(2) requires tier 2 review prior to allowing lower water quality.

Environmental Law: Water Quality

[HN27] The Environmental Protection Agency's (EPA) regulations establish three tiers of antidegradation review, and those tiers serve as the federal minimum below which state antidegradation procedures cannot fall. Nothing in the EPA's regulations, however, prevents states from setting standards above the federal minimum.

Administrative Law: Judicial Review: Standards of Review: Standards Generally

Administrative Law: Agency Rulemaking: Rule Application & Interpretation

[HN28] An agency's data selection and choice of statistical methods are entitled to great deference and its conclusions with respect to data and analysis need only fall within a zone of reasonableness. This standard, however, does not compel the court to abdicate its judicial function, and the agency must fully explicate its course of inquiry, its analysis, and its reasoning.

COUNSEL: James M. Hecker, TRIAL LAWYERS FOR PUBLIC JUSTICE, Washington, D.C., For Ohio Valley Environmental Coalition, West Virginia Rivers Coalition, Inc., West Virginia Highlands Conservancy, Inc., Greenbrier River Watershed Association, Coal River Mountain Watch, West Virginia Citizen Action Group, Friends of the Cheat, Inc., Friends of the Cacapon, Inc., American Whitewater Affiliation, Blue Heron Environmental Network, Inc., Stanley Heirs Foundation, Inc., Concerned Citizens Coalition of Roane, Calhoun and Gilmer Counties, Wheeling Environmentalists, Friends of the Little Kanawha, Plateau Action Network, Inc., Winnie Fox, Elinore Taylor, Francis D. Slider, Denise Giardina, Julian Martin, Regina M. Hendrix, Kathryn A. Stone, Doyle Coakley, Abby Chapple, and Dick Latterell, Plaintiffs.

John W. Barrett, Joseph M. Lovett, APPALACHIAN CENTER FOR THE ECONOMY AND THE ENVIRONMENT Charleston and Lewisburg, WV, For Ohio Valley[*2] Environmental Coalition, West Virginia Rivers Coalition, Inc., West Virginia Highlands Conservancy, Inc., Greenbrier River Watershed Association, Coal River Mountain Watch, West Virginia Citizen Action Group, Friends of the Cheat, Inc., Friends of the Cacapon, Inc., American Whitewater Affiliation, Blue Heron Environmental Network, Inc., Stanley Heirs Foundation, Inc., Concerned Citizens Coalition of Roane, Calhoun and Gilmer Counties, Wheeling Environmentalists, Friends of the Little Kanawha, Plateau Action Network, Inc., Winnie Fox, Elinore Taylor, Francis D. Slider, Denise Giardina, Julian Martin, Regina M. Hendrix, Kathryn A. Stone, Doyle Coakley, Abby Chapple, and Dick Latterell, Plaintiffs.

James M. Hecker, TRIAL LAWYERS FOR PUBLIC JUSTICE, Washington, D.C., For The Sierra Club, The Wilderness Society, Stewards of the Potomac Highlands, Inc., and River and Trail Outfitters, Plaintiff-Intervenors.

John W. Barrett, Joseph M. Lovett, APPALACHIAN CENTER FOR THE ECONOMY AND THE ENVIRONMENT Charleston and Lewisburg, WV, For The Sierra Club, The Wilderness Society, Stewards of

the Potomac Highlands, Inc., and River and Trail Outfitters, Plaintiff-Intervenors.

Kasey Warner, [*3] United States Attorney Michael L. Keller, Assistant United States Attorney UNITED STATES ATTORNEY'S OFFICE Charleston, WV, For Marianne Lamont Horinko, Acting Administrator, United States Environmental Protection Agency, Defendant.

Thomas L. Sansonetti, Mark A. Nitzczynski, UNITED STATES DEPARTMENT OF JUSTICE, Denver, CO, For Marianne Lamont Horinko, Acting Administrator, United States Environmental Protection Agency, Defendant.

Thomas H. Zerbe, Armando Benincasa, Perry D. McDaniel WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, Office of Legal Services Charleston, WV, For West Virginia Department of Environmental Protection, Defendant-Intervenor.

Robert R. Waters, WATERS LAW OFFICE, Huntington, WV, For West Virginia Municipal Water Quality Association, Defendant-Intervenor.

F. Paul Calamita, MCGUIRE WOODS, Christopher D. Pomeroy, AQUALAW, Richmond, VA, For West Virginia Municipal Water Quality Association, Defendants-Intervenors.

F. Paul Calamita, MCGUIRE WOODS, For West Virginia Municipal League, Defendant-Intervenor.

Robert R. Waters, WATERS LAW OFFICE, Huntington, WV, For Association of Metropolitan Sewerage Agencies, Defendant-Intervenor.

Alexandra[*4] Dapolito Dunn, General Counsel, Association of Metropolitan Sewerage Agencies Washington, D.C., For Association of Metropolitan Sewerage Agencies, Defendant-Intervenor.

David L. Yaussy, Anne C. Blankenship, Elizabeth K. Appel, ROBINSON & MCELWEE, Robert P. Paulson, M. Ann Bradley, Joseph M. Dawley, SPILMAN, THOMAS & BATTLE, Robert G. McLusky, Kathy G. Beckett, JACKSON KELLY, Leonard B. Knee, BOWLES RICE MCDAVID GRAFF & LOVE, Charleston, WV, For The Contractors Association of West Virginia, Independent Oil and Gas Association of West Virginia, West Virginia Chamber of Commerce, West Virginia Coal Association, West Virginia Farm Bureau, West Virginia Forestry Association, West Virginia Hospitality and Travel Association, West

Virginia Manufacturers Association, and West Virginia Oil and Natural Gas Association, Defendant-Intervenors.

Robert R. Waters, WATERS LAW OFFICE, Huntington, WV, For The Contractors Association of West Virginia, Independent Oil and Gas Association of West Virginia, West Virginia Chamber of Commerce, West Virginia Coal Association, West Virginia Farm Bureau, West Virginia Forestry Association, West Virginia Hospitality and Travel Association, West Virginia[*5] Manufacturers Association, and West Virginia Oil and Natural Gas Association, Defendant-Intervenors.

Anne C. Blankenship, ROBINSON & MCELWEE, Robert P. Paulson, SPILMAN, THOMAS & BATTLE, For Federal Water Quality Coalition, Defendant-Intervenor.

Robert R. Waters, WATERS LAW OFFICE, Huntington, WV, For Federal Water Quality Coalition, Defendant-Intervenor.

Fredric P. Andes, BARNES & THORNBURG, Chicago, IL, For Federal Water Quality Coalition, Defendant-Intervenor.

JUDGES: JOSEPH R. GOODWIN, UNITED STATES DISTRICT JUDGE.

OPINIONBY: JOSEPH R. GOODWIN

OPINION: MEMORANDUM OPINION & ORDER

This case involves a challenge to the Environmental Protection Agency's (the EPA's) decision, pursuant to its authority under section 303(c) of the Clean Water Act, 33 U.S.C. § 1313(c), to approve the State of West Virginia's antidegradation implementation procedures, a set of procedures designed to prevent the degradation of the State's waters. For the reasons that follow, the court concludes that the EPA acted arbitrarily and capriciously in approving West Virginia's antidegradation procedures. With respect to seven particular aspects of West Virginia's program, the EPA[*6] failed to ensure that West Virginia's procedures met minimum federal requirements, as defined by the Clean Water Act and the EPA's own regulations. In some instances there is simply insufficient evidence in the administrative record to support certain aspects of West Virginia's implementation procedures and, correspondingly, the EPA's approval of those procedures. For example, West Virginia has classified the main segments of the Kanawha and Monongahela Rivers as Tier 1 waters, but there is almost no evidence in the record about the water quality of these rivers that would justify the decision to

deny them the more stringent protection of Tier 2. See *infra* at IV.1. Nor is there sufficient evidence in the record explaining how Tier 2 review, which is location-specific and requires public participation, could be done at the time a general *section 402* or *section 404* permit was issued, rather than at the time new individual discharges are proposed. See *infra* at IV.4. In other instances, West Virginia's regulations simply fail to require the minimum protections required by the EPA's regulations, and the EPA's approval of West Virginia's procedures was based on an unreasonable attempt [*7]to effectively amend the plain meaning of those provisions so as to bring them into line with federal requirements. For example, West Virginia's procedures allow new or expanded discharges from certain wastewater treatment plants to evade Tier 2 review if the new discharge results in a "net decrease in the overall pollutant loading." The EPA approved this provision as consistent with minimum federal standards by, in effect, amending it to apply only when there is a net decrease in the pollutant loading for each pollutant parameter. See *infra* at IV.3.

Apart from the seven instances where the EPA failed to ensure that West Virginia's procedures met minimum federal requirements, however, the court rejects the plaintiffs' challenges to six other aspects of West Virginia's procedures. The EPA's conclusion that these six aspects of West Virginia's procedures satisfied minimum federal requirements was reasonable and supported by the evidence in the record. For example, the EPA reasonably concluded that best management practices for nonpoint source pollution will be "achieved," as required by EPA regulations, if those practices are "installed and maintained," as required by West Virginia's[*8] procedures. See *infra* at IV.5. Similarly, there was sufficient evidence in the record to support the EPA's approval of a provision allowing for a de minimis ten percent reduction in the available assimilative capacity of Tier 2 waters before Tier 2 review is required. See *infra* at IV.8.

That said, because the EPA failed to ensure, in a number of respects, that West Virginia's antidegradation implementation procedures were consistent with minimum federal requirements, the EPA's approval of West Virginia's procedures was arbitrary, capricious, and an abuse of discretion. Accordingly, the court VACATES the EPA's approval of West Virginia's antidegradation procedures and REMANDS to the EPA for further proceedings consistent with this opinion.

I. Background

The Clean Water Act (CWA or the Act), 33 U.S.C. § 1251 *et seq.*, was passed by Congress "to restore and maintain the chemical, physical, and biological integrity

of the Nation's waters." 33 U.S.C. § 1251(a) (2003). In particular, the CWA seeks to eliminate "the discharge of pollutants into the navigable waters" of the United States, and to "provide[*9] for the protection and propagation of fish, shellfish, and wildlife and provide[] for recreation in and on the water." Id. at §§ 1251(a)(1) & (a)(2). n1 The Supreme Court has explained that the CWA requires the Administrator of the EPA to "establish and enforce technology-based limitations on individual discharges into the country's navigable waters from point sources," and also "requires each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters." PUD No. 1 of *Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 704, 128 L. Ed. 2d 716, 114 S. Ct. 1900 (1994). Under a 1987 amendment to the Act, State water quality standards must include an antidegradation policy, which is "a policy requiring that state standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation." Id. at 705; see also 33 U.S.C. § 1313(d)(4)(B). Pursuant to this statute, the EPA promulgated a regulation governing antidegradation, 40 C.F.R. § 131.12. Section 131.12 requires[*10] States to "develop and adopt a statewide antidegradation policy and identify methods for implementing such policy." 40 C.F.R. § 131.12(a) (2003). Section 131.12 further provides that "the antidegradation policy and implementation methods shall, at a minimum, be consistent" with certain federal standards specified in the regulation. Id. States must submit their antidegradation policy and implementation procedures to the EPA. 33 U.S.C. § 1313(c)(2)(A). If the State's policy and procedures are consistent with the minimum federal standards, the EPA must approve the procedures within sixty days. Id. at 1313(c)(3). If not, the EPA must, within ninety days, "notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection." Id.

-----Footnotes-----

n1 Actually, § 1251(a)(1) provides in full that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985" Suffice it to say that this goal has yet to be achieved.

-----End Footnotes-----

[*11]

On April 14, 2001, the West Virginia legislature passed West Virginia's antidegradation implementation procedures, codified in Title 60, Series 5, of West Virginia's Code of State Regulations. n2 West Virginia submitted those procedures to the EPA on July 5, 2001, and the EPA approved the procedures on November 26, 2001. n3 On January 23, 2002, the plaintiffs, a group of concerned citizens and environmental and recreational organizations, brought this suit challenging the EPA's approval of West Virginia's procedures. n4 The plaintiffs claimed that the EPA's approval of West Virginia's antidegradation implementation procedures was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), and sought a declaration to that effect, an order setting aside the EPA's approval and remanding the case to the EPA for further proceedings, and an award of costs and expenses, including reasonable attorneys' and expert witness fees, under 28 U.S.C. § 2412. n5 In particular, the plaintiffs contend that a number of provisions of West Virginia's antidegradation implementation procedures are inconsistent[*12] with EPA regulations implementing the Clean Water Act. The primary regulation at issue is 40 C.F.R. § 131.12.

-----Footnotes-----

n2 To be perfectly clear, the court emphasizes that the plaintiffs' challenge here involves West Virginia's antidegradation implementation procedures, not its antidegradation policy. West Virginia's antidegradation policy was approved by EPA in 1995. See Administrative Record [AR] at 638. The antidegradation implementation procedures, inclusive of appendices, are found in the Administrative Record at pages 5-42.

n3 While the EPA failed to approve West Virginia's procedures within 60 days, as required by § 1313(c)(3), no party has challenged the EPA's approval on that basis.

n4 The plaintiffs are the Ohio Valley Environmental Coalition, West Virginia Rivers Coalition, Inc., West Virginia Highlands Conservancy, Inc., Greenbrier River Watershed Association, Coal River Mountain Watch, West Virginia Citizen Action Group, Friends of the Cheat, Inc., Friends of the Cacapon, Inc., American Whitewater Affiliation, Blue Heron Environmental Network, Inc., Stanley Heirs Foundation, Inc., Concerned Citizens Coalition of Roane, Calhoun and Gilmer Counties, Wheeling Environmentalists, Friends of the Little Kanawha, Plateau Action Network, Inc., Winnie Fox, Elinore Taylor, Francis D. Slider, Denise Giardina, Julian Martin, Regina M. Hendrix, Kathryn A. Stone, Doyle Coakley, Abby Chapple, and Dick Latterell. In addition, the Sierra Club, the Wilderness Society, Stewards of the Potomac Highlands, Inc., and River and Trail Outfitters have joined in the case as plaintiff-intervenors.

[*13]

n5 The plaintiffs' cause of action arises under 5 U.S.C. § 702, which provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

-----End Footnotes-----

The parties in this case, in addition to the plaintiffs and the EPA, include a number of defendant-intervenors. The defendant-intervenors are organized into three groups: the Industrial Intervenors n6; the Municipal Intervenors n7; and the West Virginia Department of Environmental Protection (WVDEP). The parties have filed cross-motions for summary judgment, and the matter is ripe for decision.

-----Footnotes-----

n6 The Industrial Intervenors consist of the Contractors Association of West Virginia, the Independent Oil and Gas Association of West Virginia, the West Virginia Chamber of Commerce, the West Virginia Coal Association, the West

Virginia Farm Bureau, the West Virginia Forestry Association, the West Virginia Hospitality and Travel Association, the West Virginia Manufacturer's Association, and the West Virginia Oil and Natural Gas Association.

[*14]

n7 The Municipal Intervenors consist of the West Virginia Municipal Water Quality Association, the West Virginia Municipal League, and the Association of Metropolitan Sewerage Agencies.

-----End Footnotes-----

Prior to turning to the merits of the case, the court will briefly discuss the relevant provisions of § 131.12. Section 131.12 provides, in relevant part, that a State's antidegradation policy and procedures must ensure that:

(1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or [*15]lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

(3) Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.

40 C.F.R. § 131.12(a)(1)-(3). These three provisions establish what are commonly referred to as three "tiers"

of antidegradation protection. See *Am. Wildlands v. Browner*, 260 F.3d 1192, 1194 (10th Cir. 2001). Tier 1 applies to all waters, and requires that existing water uses be protected. 40 C.F.R. § 131.12(a)(1). Tier 2 applies to high quality waters, defined as waters "where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on[*16] the water." Id. § 131.12(a)(2). In Tier 2 waters, water quality (as opposed to uses) "shall be maintained and protected" unless the State finds, after a process of public participation, "that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located." Id. This process of public participation and a finding of economic or social necessity is known as Tier 2 review. Tier 3 applies to high quality waters that "constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance." Id. § 131.12(a)(3). In Tier 3 waters, "water quality shall be maintained and protected," with no exception for economic or social necessity. Id. The bulk of the plaintiffs' objections to the EPA's action here involve how West Virginia's procedures provide for classification of waters as Tier 2 waters and the circumstances in which Tier 2 review is required.

II. Standard of Review

As noted above, [HN1] this court reviews the EPA's decision to approve West Virginia's antidegradation implementation[*17] procedures only to ensure that the approval was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). n8 This standard of review is "narrow," and "a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983). That said, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Id. (quotations and citation omitted). Under the arbitrary and capricious standard, the court "presumes the validity of Agency action," and the court's job is simply "to scrutinize the Agency's activity to discern whether the record reveals that a rational basis exists for the Agency's decision." *Reynolds Metals Co. v. EPA*, 760 F.2d 549, 558 (4th Cir. 1985).

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n8 Section 706 also provides that in reviewing the agency's action, "the court shall review the whole record or those parts of it cited by a party." In this case, the court has reviewed the EPA's conclusions primarily in light of the evidence cited by one of the parties either in support of or in opposition to the EPA's decision. The court has also reviewed materials in the record not directly cited in support of or against a particular position but which the court determined might be relevant to the issue at hand. The court has not, however, conducted an independent, exhaustive review of the record in search of evidence, not cited by any party, that might conceivably support a party's position. See, e.g., *Johnson v. Cambridge Indus.*, 325 F.3d 892, 895 (7th Cir. 2003) ("the district court was ... entitled to rely on the materials each party cited."); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 672 (10th Cir. 1998) ("The district court has discretion to go beyond the referenced portions of these materials, but is not required to do so ... [Courts are] wary of becoming advocates who comb the record of previously available evidence and make a party's case for it.").

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[*18]

[HN2] When reviewing a federal agency's interpretation of a statute that it administers, the court "first asks 'whether Congress has directly spoken to the precise question at issue.'" *Satellite Broad. & Communications Ass'n v. FCC*, 275 F.3d 337, 369 (4th Cir. 2001) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)). "If [the court] can discern Congress's intent ... by using 'traditional tools of statutory construction,' [the court] must give effect to that intent." Id. (quoting *Chevron*, 467 U.S. at 843 n.9). On the other hand, if "the statute is 'silent or ambiguous' about the issue, we must defer to the agency's reasonable construction of the statute." Id. (quoting *Chevron*, 467 U.S. at 843-44). "This analytical approach applies not only when a regulation is directly challenged, ... but also when a particular agency action is challenged," as is the case here. *Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425, 439 (4th Cir. 2003) (emphasis omitted). The court also defers to the EPA's reasonable interpretation[*19] of its regulations, unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461, 137 L. Ed. 2d 79, 117 S. Ct. 905 (1997) (quotations and citation omitted).

[HN3] As for an agency's factual findings, the court "should accept the agency's factual findings if those findings are supported by substantial evidence on the record as a whole," even if there are "alternative findings that could be supported by substantial evidence." *Arkansas v. Oklahoma*, 503 U.S. 91, 113, 117 L. Ed. 2d 239, 112 S. Ct. 1046 (1992) (citation omitted). "Particular deference is given by the court to an agency with regard to scientific matters in its area of technical expertise." *Nat'l Wildlife Fed'n v. EPA*, 351 U.S. App. D.C. 42, 286 F.3d 554, 560 (D.C. Cir. 2002).

[HN4] To obtain summary judgment, the moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. In this case, the only material facts are those contained in the administrative record. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971);[*20] *Virginia Agr. Growers Ass'n v. Donovan*, 774 F.2d 89, 92 (4th Cir. 1985). Furthermore, as stated above, this court will accept the EPA's factual findings "if those findings are supported by substantial evidence on the record as a whole." *Arkansas*, 503 U.S. at 113. If the administrative record does reveal some genuine issue of material fact - that is, if the evidence in the administrative record could reasonably support different factual conclusions - the court defers to the EPA's reasonable resolution of that factual question. To put it another way, when a court reviews an agency action, the "plaintiff's burden on summary judgment is not materially different from his ultimate burden on the merits." *Krichbaum v. U.S. Forest Service*, 17 F. Supp.2d 549, 556 (W.D. Va. 1998). Accordingly, this matter is appropriately resolved on cross-motions for summary judgment.

III. Standing

Under *Article III of the United States Constitution*, [HN5] "the judicial Power [of the United States] shall extend to all Cases ... [and] Controversies" *U.S. Const. art. III, § 2*. [HN6] Among other things, the "case and controversy" requirement ensures that[*21] the federal judicial power can be exercised only when a plaintiff has standing to bring suit. See *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 153 (4th Cir. 2000). "The standing inquiry ensures that a plaintiff has a sufficient personal stake in a dispute to render judicial resolution appropriate." *Id.* In this case, the EPA has not challenged the plaintiffs' standing to bring suit. Nor do the WVDEP or the Industrial Intervenors question the plaintiffs' standing in this case. The only parties to challenge the plaintiffs' standing are the Municipal Intervenors. Because *Article III* standing is

a jurisdictional requirement, this court must satisfy itself of a plaintiff's standing regardless of whether any party has raised the issue. See *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002); *Skrzypczak v. Kauger*, 92 F.3d 1050, 1052 (10th Cir. 1996); *Dan River, Inc. v. Unitex Ltd.*, 624 F.2d 1216, 1223 (4th Cir. 1980).

To demonstrate *Article III* standing, a "plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual[*22] or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envt'l Services, Inc.*, 528 U.S. 167, 180-81, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000). The Fourth Circuit has explained that "in the environmental litigation context, the standing requirements are not onerous." *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 517 (4th Cir. 2003). In order to demonstrate their standing in this case, the plaintiff organizations filed affidavits from eight of their members articulating the types of harms they would suffer as a result of the EPA's approval of West Virginia's antidegradation procedures. n9

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n9 "An organization has representational standing when (1) at least one of its members would have standing to sue in his own right; (2) the organization seeks to protect interests germane to the organization's purpose; and (3) neither the claim asserted nor the relief sought requires the participation of individual members in the lawsuit." *Gaston Copper*, 204 F.3d at 155 (citation omitted). There is no dispute in this case that if the individual affiants have standing to sue, the plaintiff organizations of which they are members also have standing.

-----End Footnotes-----

[*23]

Michael Hartman states that he has long participated in boating, fishing, and swimming in the Kanawha River, and plans to continue to do so. n10 Pls.' Op. Br., App. 1. He also enjoys watching the Kanawha River from a

riverside park in his hometown of St. Albans, West Virginia. Id. He expresses concern that any degradation of the water quality of the Kanawha River will impair his recreational and aesthetic enjoyment of the river. Id. He also claims that a clean environment is critical to the region's social and economic growth, because a clean environment is a primary concern for new individuals and businesses considering relocation to West Virginia. Id. A lowering of the water quality in the river, he states, will harm his interest in the area's continued social and economic growth and vitality. Id.

-----Footnotes-----

n10 Mr. Hartman is a member of the West Virginia Rivers Coalition, West Virginia Citizen Action Group, West Virginia Highlands Conservancy, and the Ohio Valley Environmental Coalition.

-----End Footnotes-----

Liz Garland, [*24] a resident of Elkins, West Virginia, states that she is an avid whitewater canoeist and that she paddles on a number of the State's rivers and streams. n11 Pls.' Op. Br., App. 2. She expresses concern over contact with pollutants in the waters where she canoes and states that a reduction in the quality of these waters would cause her to limit or end her canoeing activities in those waters. Id.

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n11 Ms. Garland is a member of the West Virginia Rivers Coalition and the Plateau Action Network.

-----End Footnotes-----

Deborah Wise, a resident of Morgantown, West Virginia, states that the main source of her drinking water is the Monongahela River. n12 Pls.' Op. Br., App.

3. In addition, she serves as a raft guide in the Gauley, Cheat, Cherry, and New Rivers. Id. She expresses concern that degradation of these waters would cause her loss of income as well as loss of her own recreational enjoyment. Id.

-----Footnotes-----

n12 Ms. Wise is a member of the West Virginia Rivers Coalition.

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[*25]

Leslee McCarty, a resident of Hillsboro, West Virginia, states that she operates a bed and breakfast near the Greenbrier River and frequently swims or kayaks in the Greenbrier and other rivers in the State. n13 Pls.' Op. Br., App. 4. She states that her bed and breakfast guests are often concerned about the quality of the Greenbrier River. Id. She expresses concern that any decline in the quality of water in these rivers would decrease her aesthetic enjoyment of these rivers, as well as the economic and recreational benefits that the rivers provide her. Id. A number of other individuals claim similar aesthetic, recreational, and economic interests in the water quality of a number of the State's water bodies. Pls.' Op. Br., App. 5-8.

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n13 Ms. McCarty is a member West Virginia Highlands Conservancy and the West Virginia Citizen Action Group, and is the coordinator of the Greenbrier River Watershed Association.

-----End Footnotes-----

The Municipal Intervenors argue that the plaintiffs cannot demonstrate a concrete and particularized[*26] injury because West Virginia's implementation

procedures fully require the State to maintain and protect existing instream water uses. So long as existing uses are protected, they argue, any failure by the State to adequately protect water quality cannot cause any concrete, actual harm. The Municipal Intervenors' argument boils down to the position that no party can ever have standing to challenge the EPA's approval of a State's antidegradation plan on the grounds that the plan does not comply with the minimum requirements of Tier 2 or Tier 3, which protect water quality, as opposed to Tier 1, which protects existing uses. This is because, they argue, no actual, concrete injury can ever flow from a State's failure to protect water quality, so long as the State adequately protects the existing uses of a water body.

The court disagrees. The Supreme Court has explained that [HN7] "the actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing'" *Warth v. Seldin*, 422 U.S. 490, 500, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). That is to say, Congress may, by statute, [*27] create cognizable legal interests, the injury of which suffices for Article III standing. Contrary to the Municipal Intervenors' assumption, [HN8] the Clean Water Act is not concerned solely with protecting existing uses of the nation's waters. The Act is intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In addition to protecting wildlife and recreation, id. § 1251(a)(2), the Act seeks to eliminate "the discharge of pollutants into the navigable waters." Id. § 1251(a)(1). These provisions make clear that the Act is not concerned solely with the uses of waters, but also with the quality of waters. The plaintiffs in this case have "alleged precisely those types of injuries that Congress intended to prevent by enacting the Clean Water Act." *Gaston Copper*, 204 F.3d at 156. Specifically, they have alleged a threat of harm to their aesthetic, recreational, and economic interests protected by the Clean Water Act's goal of maintaining water quality. See *id.* at 154 (holding that damage to aesthetic, recreational, or economic interests can constitute[*28] injury in fact). Even if the lowering of water quality does not affect existing uses, such as fishing or swimming, that lower water quality could still affect the plaintiffs' aesthetic and economic interests. [HN9] "Environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Laidlaw*, 528 U.S. at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972)).

The plaintiffs state that they enjoy and value the visual beauty of the State's rivers. Water degradation, even

degradation that does not result in the elimination of aquatic life or danger to human use or consumption, could still impact a water body's clarity and appearance. In addition to damaging the plaintiffs' aesthetic interests, such degradation could also injure their economic interests, which depend on the aesthetic enjoyment of others. Deborah Wise's work as a whitewater raft guide would be affected by a decrease in her clients' aesthetic enjoyment of the water. The same is true of Leslee McCarty [*29] and the guests that frequent her bed and breakfast. The individual affidavits, the factual content of which is not contested, illustrate how West Virginia's antidegradation procedures will "affect the plaintiff[s] in a personal and individual way," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992), and serve to "differentiate [the plaintiff organizations] from the mass of people who may find the conduct ... objectionable only in an abstract sense." *Gaston Copper*, 204 F.3d at 156.

The court is also satisfied that these threatened injuries are "actual or imminent, not conjectural or hypothetical." *Laidlaw*, 528 U.S. at 180. Here, the individual affiants currently use a number of West Virginia's waterways for a variety of specific activities and have demonstrated a legally protected interest in maintaining the quality of that water. There is no doubt that West Virginia's regulations would permit a greater reduction in water quality than what would be permitted under the plaintiffs' version of the minimum federal requirements. For example, if the plaintiffs' claims are correct on the merits, [*30] West Virginia cannot allow a twenty percent cumulative reduction in the assimilative capacity of a given water body without conducting Tier 2 review. n14 See *infra* part IV.8. Similarly, if the Kanawha and Monongahela Rivers should be classified as Tier 2 water bodies, West Virginia's classification of those rivers as Tier 1 will certainly permit greater degradation of those rivers' water quality. See *infra* part IV.1. Accordingly, the court concludes that the threatened injury to the plaintiffs caused by the EPA's approval of West Virginia's antidegradation procedures is actual and imminent. n15

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n14 To determine standing, the court assumes the validity of the plaintiffs' claims on the merits. See *Warth*, 422 U.S. at 500; *Campbell v. Clinton*, 340 U.S. App. D.C. 149, 203 F.3d 19, 34-35 (D.C. Cir. 2000).

n15 The fact that the harms flowing from water degradation are merely threatened by the EPA's approval of West Virginia's procedures rather than already occurring does not undermine the plaintiffs' standing, for there is "no doubt that threatened injury to [a plaintiff] is by itself injury in fact." *Gaston Copper*, 204 F.3d at 160. In addition, while a claimed injury must be actual, it "need not be large, an identifiable trifle will suffice." *Id.* at 156 (quoting *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir. 1996)).

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The United States District Court for the District of Colorado reached the same conclusion in a case involving almost identical circumstances. In *American Wildlands v. Browner*, 94 F. Supp.2d 1150 (D. Colo. 2000), the court held that the plaintiffs, a group of environmental organizations, had standing to bring suit challenging the EPA's approval of revisions to Colorado's water quality standards, including Colorado's antidegradation implementation procedures. *Id.* at 1155-56. The court found standing based on affidavits, filed by individual members of the organizations, detailing those individuals' "aesthetic, conservation, and economic interests in preserving Montana's waters" and the individuals' "use of these waters in the form of drinking, fishing, swimming, and agricultural and household use." *Id.* at 1155. The supporting affidavits are very similar to those submitted here. *Id.* The court held that the affidavits "sufficed to establish [the individuals] have suffered an injury in fact to their aesthetic, conservation, and economic interests." *Id.* at 1156. n16

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n16 On the merits, the court granted summary judgment to the EPA, and this decision was affirmed on appeal by the Tenth Circuit. *Am. Wildlands v. Browner*, 260 F.3d 1192 (10th Cir. 2001). Because the Tenth Circuit affirmed the court's grant of summary judgment to the EPA, that court did not address the plaintiffs' standing.

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[*32]

Having satisfied itself of the plaintiffs' injury in fact, the court has little trouble concluding that "the injury is fairly traceable to the challenged action of the defendant" and that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Laidlaw*, 528 U.S. at 180-81. The Municipal Intervenors do not contest these elements (nor does any other party). If, as this court has concluded, the plaintiffs will suffer injury in fact from a reduction in water quality in West Virginia's rivers, it is clear that this injury is traceable to the EPA's approval of West Virginia's allegedly substandard antidegradation procedures, and that a favorable judicial decision could redress this injury by causing the promulgation (either by the State or the EPA) of stricter regulations. Accordingly, the court concludes that the plaintiffs in this case have standing to challenge the EPA's approval of West Virginia's antidegradation procedures.

IV. Merits

The court now turns to the merits of the plaintiffs' claims. In the plaintiffs' motion for summary judgment, the plaintiffs allege ten specific instances in which West Virginia's[*33] antidegradation implementation procedures are inconsistent with minimum federal requirements, and in which the EPA's approval of West Virginia's procedures was therefore arbitrary and capricious. n17 Each of the challenges involves a particular aspect of West Virginia's procedures. For the most part the challenges are independent of one another and therefore resist a general summary. Without attempting a summary, then, the court will address these issues in the order raised by the plaintiffs.

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n17 The plaintiffs' complaint raises additional issues that have not been argued on summary judgment. Claims raised in a complaint but not argued to the court are deemed to be waived. *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 810 (7th Cir. 2001). In addition, the plaintiffs have withdrawn their challenge to section 60-5-6.3.k, dealing with short-term water quality impacts. See Pls.'s Reply Br. at 30 n.17.

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1. Classification of segments of the Kanawha and Monongahela Rivers as Tier 1 waterways[*34]

Section 60-5-4.3 of West Virginia's antidegradation implementation procedures provides that:

In determining whether a water segment is afforded only Tier 1 protection, the agency will focus on whether the water segment is meeting or failing to meet minimum uses, except that, notwithstanding any other provision of this rule, the main stems of the Monongahela River, and the Kanawha River from milepoint 72 to the confluence with the Ohio River shall be afforded Tier 1 protection only.

The plaintiffs argue that there is insufficient evidence in the administrative record to permit the EPA to conclude that these segments of the Monongahela and Kanawha Rivers are not entitled to Tier 2 protection. In fact, the plaintiffs state that the only evidence in the record regarding the water quality levels in these river segments indicates that they should be categorized as Tier 2 waterways. The plaintiffs point to a letter by Jeffrey Towner of the United State Fish and Wildlife Service (USFWS) written to the EPA in response to the EPA's request for comments on West Virginia's proposed antidegradation implementation procedures. In this letter, the USFWS objects to the classification[*35] of these river segments as Tier 1 waters, stating that "water quality parameters in these waters exceed levels necessary to support minimum use and [the waters] are therefore Tier 2 waters." AR 633.

In response, the EPA argues that "EPA's antidegradation regulation gives states the discretion regarding how to identify 'high quality waters' that are afforded Tier 2 protection." EPA Op. Br. at 48. Specifically, the EPA argues that states may choose to use either a "pollutant-by-pollutant" approach or a "water body-by-water body" approach to classifying water segments. The court agrees with [HN10] the EPA that its regulations give states some discretion in how they identify waters as Tier 2 waters. The EPA discusses its approach to Tier 2 waters in its advanced notice of proposed rulemaking (ANPRM) for 40 C.F.R. Part 131. See *Water Quality Standards Regulation*, 63 Fed. Reg. 63,742 (proposed July 7, 1998) (to be codified at 40

C.F.R. pt. 131); AR 514-79. n18 In the ANPRM, the EPA states that § 131.12(a)(2), the regulation establishing the Tier 2 designation, "does not include specific guidelines for identifying high quality waters." 63 Fed. Reg. 63,742, 36,782;[*36] AR 555. The EPA notes that various EPA guidance documents "make a variety of suggestions concerning approaches to defining tier 2 waters," and that "States and Tribes have developed various ways to identify tier 2 waters." Id. In particular, the EPA states that the various approaches to classifying waters "fall into two basic categories: (1) pollutant-by-pollutant approaches; and (2) water body-by-water body approaches." Id.

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n18 For administrative materials available in the administrative record, such as this document, the court will include a citation to the administrative document as well as to the record.

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[HN11] Under the pollutant-by-pollutant approach, the State makes a classification for each pollutant in a given water body. The water body is classified as Tier 2 for those pollutants for which "water quality is better than applicable criteria" Id. The same water body therefore could be classified as Tier 2 for certain pollutants and Tier 1 for other pollutants: "available assimilative capacity[*37] for any given pollutant is always subject to tier 2 protection, regardless of whether the criteria for other pollutants are satisfied." Id. Under the water body-by-water body approach, States "weigh a variety of factors to judge a water body segment's overall quality." Id. Tier 2 classification is based on the overall quality of the water body segment, not on individual pollutants. Id. The EPA stated that "there are advantages and disadvantages to each approach," and that "either, when properly implemented, is acceptable." Id. The pollutant-by-pollutant approach may be "easier to implement because the need for an overall assessment considering various factors is avoided" and "may result in more waters receiving some degree of tier 2 protection" because the overall quality need not be high. Id. On the other hand, the water body-by-water body approach "allows for a weighted assessment of chemical, physical, biological, and other information (e.g., unique ecological

or scenic attributes)," and thus "may be better suited to EPA's stated vision for the water quality standards program: refined designated uses with tailored criteria, complete information on uses and use[*38] attainability, and clear national norms." 63 Fed. Reg. 63,742, 36,783; AR 556. A danger in the water body-by-water body approach is that a State might not "develop inclusive qualification criteria" but might define overall water quality so as to include only a "narrow universe of waters," excluding "many deserving high quality waters." Id.

While the plaintiffs do not concede that the water body-by-water body approach is an acceptable manner of classifying waters, they spend the bulk of their energies arguing that even assuming this approach is permissible in general, West Virginia's designation of the main segments of the Kanawha and Monongahela Rivers in this case is unsupported by evidence. In light of the EPA's regulation, which does not specify a particular approach to classification, and in light of the EPA's explanation of why either approach is acceptable, the court concludes that the EPA's regulations permit a State to adopt a water body-by-water body approach to classification, assuming that this approach is implemented adequately. As such, the court agrees with the EPA that there is nothing inherently problematic about West Virginia's designation of large[*39] river segments as Tier 1 waters, assuming that this designation is supported by some data regarding the "chemical, physical, biological, ... ecological[, ... scenic [or other] attributes," id., of those water bodies that justify West Virginia's assessment that these water bodies, overall, are not high quality.

The EPA also argues that using the water body-by-water body approach to designate these river segments as Tier 1 waters allows the WVDEP to focus its limited regulatory resources on the State's Tier 2 waters. In the 1998 ANPRM, the EPA noted that the water body-by-water body approach "allows States ... to focus limited resources on protecting higher-value State ... waters." Id. The court acknowledges the value of a State focusing its resources on high quality waters, and agrees with the EPA that the water body-by-water body approach may be an effective manner of achieving this benefit. [HN12] The EPA's regulations place limits, however, on the degree to which a State may exclude some waters from heightened protection so as to devote more resources to higher quality waters. For example, under the three-tier system established in 40 C.F.R. § 131.12[*40], a State could not relegate all waters to Tier 1 classification other than "waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance." 40 C.F.R. § 131.12(a)(3). Even though such a decision would undoubtedly allow the

State to devote many more resources to preserving its most important waters (its Tier 3 waters), the regulations do not permit the State to accomplish this goal by denying Tier 2 protection to deserving high quality waters (as defined by § 131.12(a)(2)). The desire to preserve and focus state resources is a permissible goal under the EPA's regulations, but that goal must be implemented in a manner consistent with the regulations' minimum requirements. "The agency charged with implementing the statute is not free to evade the unambiguous directions of the law merely for administrative convenience." *Brown v. Harris*, 491 F. Supp. 845, 847 (N.D. Cal. 1980) (citing *Manhattan Gen. Equip. Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134, 80 L. Ed. 528, 56 S. Ct. 397 (1936)).

The court is satisfied that the water body-by-water body approach permits a State to make an overall[*41] classification of a particular water body without needing to make a classification for each individual pollutant, and that this approach has the benefit of allowing a State to focus its resources on overall high quality waters. The question remains, however, whether the segments of the Kanawha and Monongahela Rivers at issue here are, overall, the sort of "high quality" water bodies deserving of Tier 2 protection. To answer this question, one must know something about the quality of water in those rivers.

Apart from these general points about the regulatory scheme, which the court takes no issue with on an abstract basis, the EPA points to only one piece of evidence that pertains directly to the water quality in the Kanawha and Monongahela Rivers. That evidence is the fact that both river segments are on a list of impaired waters prepared by the WVDEP for submission to the EPA under section 303(d) of the Clean Water Act. [HN13] Section 303(d) requires States to submit to the EPA a list of waters that fail to meet water quality standards for at least one pollutant parameter. See 33 U.S.C. § 1313(d). West Virginia's section 303(d) list is not included in the[*42] administrative record, but limited excerpts of the State's 2002 list are included as an exhibit to the Industrial Intervenor's Brief in Support of their Motion for Summary Judgment. Ind. Br., Exh. 9. Despite the fact that this list is not in the administrative record, the court takes judicial notice of the list (more specifically, those portions of the list that were submitted to the court), as the list is a formal document produced by the West Virginia DEP and submitted to the EPA. See *City of Charleston v. A Fisherman's Best, Inc.*, 310 F.3d 155, 171-72 (4th Cir. 2002) (taking judicial notice of a fishery management plan prepared by a federal agency); *Fornalik v. Perryman*, 223 F.3d 523, 529 (7th Cir. 2000) ("It is well-established that executive and agency determinations are subject to judicial notice.").

Neither the EPA nor the intervenors give the court much guidance on how to interpret this incomplete document, other than to state that the relevant segments of the Kanawha and Monongahela Rivers are on the list. Page twelve of the document contains a discussion of the Kanawha River and the Monongahela River. Ind. Br., Exh. 9, at 12. According to[*43] this discussion, the Kanawha is listed as impaired related to its dioxin levels, but its zinc levels, which were impaired in the past, now satisfy water quality standards. The Monongahela is listed as impaired related to aluminum and fecal coliform levels. According to the EPA, there are 574 waters on this list, and the EPA argues that the fact that West Virginia listed only two of these 574 waters as Tier 1 waters supports the EPA's conclusion that the classification is reasonable. The court disagrees - on the contrary, these facts clearly show that a listing on the State's *section 303(d)* list is not sufficient to remove a water body from Tier 2 protection and that more evidence is needed.

The EPA does not discuss the Kanawha and Monongahela's particular *section 303(d)* impairments, or why those impairments render these rivers Tier 1 waters as opposed to other listed waters with similar impairments. For example, the *section 303(d)* list also includes the Guyandotte River. According to a discussion preceding the listing, the Guyandotte is impaired related to iron, aluminum, and fecal coliform, and the upper segment of that river is also listed for biological impairment. Ind. Br., Exh. [*44] 9, at 12. The EPA does not explain why the Monongahela, which is impaired related to aluminum and fecal coliform, is listed as a Tier 1 water body whereas the upper segment of the Guyandotte, which is impaired related to these two pollutants and also for iron and biological impairments, is not listed as a Tier 1 water body.

The EPA has not even attempted to explain why the Kanawha and Monongahela's appearance on the *section 303(d)* list means that those rivers are not, overall, high quality waters. The EPA itself warned of the risk under the water body-by-water body approach of failing to develop adequate "inclusive qualification criteria" for identifying Tier 2 waters, 63 *Fed. Reg.* 63,742,36,783; AR 556, but that is precisely what seems to have occurred here. Apart from the *section 303(d)* listing, neither the EPA nor the WVDEP has identified any qualification criteria -- such as chemical, physical, biological, ecological, scenic, or other attributes - against which these river segments (and others) can be judged and classified as Tier 1 or Tier 2. n19 In short, there may be legitimate reasons why these two river segments are classified as Tier 1 bodies, but the EPA[*45] has not offered any such reasons or identified anything in the

record (or, in the case of the *section 303(d)* list, outside of the record) that would support this classification. This court is mindful of its task to "accept the agency's factual findings if those findings are supported by substantial evidence on the record as a whole." *Arkansas v. Oklahoma*, 503 U.S. 91, 113, 117 L. Ed. 2d 239, 112 S. Ct. 1046 (1992) (emphasis omitted). In this case, however, the only evidence in the record related to the water quality levels in the Kanawha and Monongahela is the letter from the USFWS stating that "water quality parameters in these waters exceed levels necessary to support minimum use and [the waters] are therefore Tier 2 waters." AR 633. The court does not suggest that this letter proves that these river segments merit Tier 2 classification. Rather, the letter, which supports the plaintiffs' position, illustrates the total absence of any contrary record evidence supporting West Virginia's classification of these waters as Tier 1 waters, or supporting the EPA's conclusion that this classification satisfies its regulations.

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n19 The Industrial Intervenors cite to another piece of evidence apart from the *section 303(d)* list that, they argue, supports the classification of these water bodies as Tier 1 waters. The Kanawha River has been listed on fish advisories released by the West Virginia Department of Health and Human Resources. See Ind. Br., Exh. 10. As evidence in support of a Tier 1 designation, however, the fish advisory list suffers from the same serious flaw as the *section 303(d)* list - other rivers also appear on the list, and there is no explanation for why the advisory for the Kanawha renders it a Tier 1 water as opposed to other waters. Id. In addition, the list advises against any consumption of certain specified fish from the lower segment of the Kanawha (carp, catfish, suckers, and hybrid striped bass), but permits up to one meal per month for all remaining fish. Id. The Industrial Intervenors do not explain why this particular fish advisory renders the Kanawha a Tier 1 water. As for the Monongahela River, it does not appear on the fish advisory list at all.

In addition, the Industrial Intervenors assert that both of these rivers have been "primary centers for industrial and commercial development in West Virginia for over 200 years," and that both rivers are "the site of electric generating facilities, chemical plants, municipal sewage plants, heavy manufacturing, and coal mining operations." Ind. Br. at 23. These claims are not supported by any citation

to the administrative record. Moreover, to the extent the Industrial Intervenor urge the court to take judicial notice of these facts, the court would take equal notice of the remarkable progress that these rivers have made in the past several decades. None of these general observations, however, form a sufficient evidentiary basis for classifying these rivers.

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In light of the total absence of any evidence about the quality of water in these river segments apart from their listing on the *section 303(d)* list, the court concludes that the EPA's approval of section 4.3's classification of these segments of the Kanawha and Monongahela Rivers as Tier 1 waters was arbitrary and capricious.

2. Exempting existing permitted uses from antidegradation review

West Virginia's Tier 2 antidegradation review procedures are set forth in section 60-5-5.6 of the West Virginia regulations. The regulations provide that Tier 2 review is required in any Tier 2 water segment when: (1) "The regulated activity is a new or expanded activity ...," section 5.6.a.1, or (2) "The Secretary [of the WVDEP] determines, upon renewal of a permit or certification, that other individual circumstances warrant a full review such as cumulative degradation resulting from multiple discharges within a watershed, degradation resulting from a single discharge over time, or degradation caused by a regulated facility's historic noncompliance with its permit." Section 5.6.a.2. Thus, Tier 2 review always applies on Tier 2 waters for new or expanded activities but only applies[*47] to the renewal of an existing permitted activity when the Secretary of the WVDEP determines that individual circumstances warrant a full review. The plaintiffs argue that all point source discharges, whether pre-existing or new, must undergo Tier 2 review, and that the general exemption for existing permitted discharges and the renewal of such existing discharges is contrary to the EPA's regulations.

The plaintiffs first argue that this exemption is inconsistent with EPA's Tier 2 regulation, which provides that "the State shall assure that there shall be achieved the highest statutory and regulatory requirement for all new and existing point sources." 40 C.F.R. § 131.12(a)(2) (emphasis added). This means, the plaintiffs argue, that existing permitted uses must be

subjected to Tier 2 review. The EPA correctly points out that the plaintiffs take *section 131.12(a)(2)*'s reference to "existing point sources" out of context. The plaintiffs confuse the substance of Tier 2 review with the standard for when Tier 2 review is required.

[HN14] Tier 2 review is required when an activity on a Tier 2 water body threatens to lower the existing water quality. 40 C.F.R. § 131.12(a)(2)[*48] (water quality "shall be maintained and protected"). The mention of "existing point sources," in contrast, appears in the latter part of § 131.12(a)(2), which sets out the substance of Tier 2 review. When Tier 2 review is triggered, a lowering of water quality is permissible only after a process of public comment and a finding that the degradation is necessary to accommodate important economic or social development in that area. Id. § 131.12(a)(2). But even when the State "allows such degradation or lower water quality, ... the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and cost-effective and reasonable best management practices for nonpoint source control." Id. (emphasis added). In other words, even after public participation and a finding of necessity, a new or expanded use is permitted to degrade water quality only when the State assures that all other new and existing point sources are achieving the highest regulatory requirements and that nonpoint sources are controlled by best management practices. The reference to "new and existing point sources" in § 131.12(a)(2) [*49] does not refer to when Tier 2 review is required, but refers to what the State must assure as to other sources before it will permit additional discharge from a new or expanded source. Thus, the plaintiffs' argument in this regard is without merit.

The plaintiffs next argue that EPA regulations require protection of "existing uses." The phrase "existing uses" is defined in the EPA's regulations as follows: [HN15] "existing uses are those uses actually attained in the water body on or after November 28, 1975." Id. § 131.3(e). In light of this definition, the plaintiffs argue, any discharge permit issued after November 28, 1975, must be subjected to antidegradation review. [HN16] The main reference to "existing uses" in the EPA's antidegradation policy is in Tier 1, which provides that "existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." Id. § 131.12(a)(1). Indeed, the EPA notes that Tier 1, which protects "existing uses," "protects the highest use attained in the water body on or after November 28, 1975, whether or not the use is included in the water quality standards." EPA Reply Br. at 10 n.6. Accordingly, [*50] the EPA agrees with the plaintiffs about the meaning of the term "existing uses."

The term "existing uses" is not used, however, to establish when Tier 2 review is required. Rather, the regulation provides that "where the quality of the waters exceed levels necessary to support ... wildlife and recreation in and on the water, that quality shall be maintained and protected" 40 C.F.R. § 131.12(a)(2) (emphasis added). The present tense use of the verb "exceed" suggests that Tier 2 protections apply to current water quality levels, not to any levels that have existed on or after 1975. Nothing elsewhere in the EPA's regulations suggests to the contrary, so the EPA's interpretation of Tier 2 as applying to current water quality levels is reasonable.

Finally, the plaintiffs argue that even if Tier 2 review only protects current water quality levels on Tier 2 waters, it is unreasonable to assume that existing permitted uses will not further lower those levels. The plaintiffs point to a Guidance Document issued by EPA Region 4, which states that "it is generally accepted that a new or increased volume of discharge will result in the lowering of water[*51] quality for a Tier II water body. However, changes in the chemical matrix in industrial wastewater ... due to process/production changes can also result in degradation." Pls.' Op. Br., App. 11, at 3. According to the plaintiffs, this latter sentence shows that the EPA has recognized that existing uses that are not expanded can nonetheless further degrade existing water quality. The EPA responds by quoting from its Water Quality Standards Handbook, which states that "new discharges or expansion of existing facilities would presumably lower water quality and would not be permissible unless the State conducts" Tier 2 review. 1994 Water Quality Standards Handbook, Ch. 4.5, at 4-7 (2d ed. 1994); AR 329. This document makes no reference to potential degradation of current water quality levels from pre-existing permitted uses.

In addition, the EPA points out that under West Virginia's plan, Tier 2 review also applies to the renewal of an existing permit when the Secretary of the WVDEP determines "that other individual circumstances warrant a full review." Section 5.6.a.2. The EPA states that "examples of situations where a full review may be warranted are 'cumulative degradation result[ing][*52] from multiple discharges within a watershed, degradation resulting from a single discharge over time, or degradation caused by a regulated facility's historic noncompliance with its permit.'" EPA Op. Br. at 26 (quoting section 5.6.a.2). From the evidence in the record, it appears that the EPA's conclusion that existing uses will not usually degrade water quality is reasonable. West Virginia also has provided for the Secretary to invoke Tier 2 review when circumstances warrant and has specified at least some instances in which Tier 2 review is warranted, such as degradation resulting from a

single discharge over time. n20 It was therefore reasonable for the EPA to approve section 5.6.a.2 based on its conclusions that existing discharges will not normally result in further degradation and that West Virginia has ensured Tier 2 review when further degradation does result from an existing discharge or discharges.

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n20 The court reads the examples listed in section 5.6.a.2 as circumstances where full Tier 2 review is warranted, not merely where such review might be warranted. No party has suggested why it would be permissible, in light of the command in § 131.12(a)(2) that water "quality shall be maintained and protected," to fail to conduct Tier 2 review for an existing discharge if that discharge, either alone or in combination with other discharges, was actually causing continuing significant degradation. If section 5.6.a.2 were interpreted to allow the Secretary of the WVDEP to decline to order Tier 2 review when an existing permitted discharge was causing significant degradation, then section 5.6.a.2 would clearly be inconsistent with § 131.12(a)(2).

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3. Exempting discharges from public wastewater treatment plants when there is a net decrease in overall pollutant loading

Section 60-5-5.6c of the West Virginia procedures provides that:

A proposed new or expanded discharge from a publicly owned or publicly owned and privately operated sanitary wastewater treatment plant constructed or operated to alleviate a public health concern associated with failing septic systems or untreated or inadequately treated sewage, is exempt from Tier 2 review. This exemption ... applies only where there will be a net decrease in the overall pollutant loading discharged to the combined receiving waters.

The plaintiffs contend that this provision does not comply with the EPA's regulations, because the exemption from Tier 2 review applies even when the new or expanded discharge results in an increase in individual pollutant parameters, so long as there is a decrease in the overall discharge of pollutants from the facility. The plaintiffs argue that because some pollutants are more harmful than others, allowing an increase in a particularly harmful pollutant to be offset by a reduction in a less harmful pollutant would not ensure[*54] that existing water quality is maintained and protected, as required by 40 C.F.R. § 131.12(a)(2). In response, the EPA agrees with the plaintiffs' characterization of § 131.12(a)(2) but contends that section 5.6.c complies with that standard. In its approval letter, the EPA stated that it interprets the phrase "net decrease in the overall pollutant loading" to mean "that there must be a net reduction in the loading for the parameter of concern for this exemption to apply." AR 110. In other words, both the plaintiffs and the EPA agree that a new or expanded discharge from publicly owned wastewater treatment plants cannot be exempted from Tier 2 review if there is a net increase in any individual pollutant parameter. They disagree about whether section 5.6.c reflects this rule.

It is well established that [HN17] a reviewing court must defer to an agency's reasonable interpretation of the statute the agency is authorized to administer or one of the agency's own regulations. See *Crutchfield v. County of Hanover*, 325 F.3d 211, 218 (4th Cir. 2003). Judicial deference to an agency's "reasonable interpretations of governing law" is based in part on the[*55] notion that when "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). Judicial deference is also based on an acknowledgment that "the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *United States v. Mead Corp.*, 533 U.S. 218, 227, 150 L. Ed. 2d 292, 121 S. Ct. 2164 (2001) (quotations and citations omitted).

The issue presented here, however, is how this court should review the EPA's interpretation of West Virginia's regulations. There is no dispute between the plaintiffs and the EPA about the meaning of the EPA's regulations; rather, the only dispute is whether West Virginia's procedures satisfy the EPA's agreed-upon standards. Neither party cites any caselaw addressing the proper standard of judicial review in this circumstance, even though it is far from obvious [*56]that the traditional

deference accorded administrative decisions applies in this circumstance. n21 The EPA's task under the CWA was simply to approve or disapprove West Virginia's antidegradation procedures, depending on whether those procedures were "consistent with" the Act and the EPA's own regulations interpreting that Act. 33 U.S.C. § 1313(c). [HN18] The court owes judicial deference to the EPA's interpretations of the Act and its own regulations in part because Congress has charged the EPA with administering those laws. But Congress has not charged the EPA with administering West Virginia's antidegradation procedures -- that task is left to West Virginia.

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n21 The plaintiffs cite caselaw holding that a reviewing court owes no deference to a State agency's interpretation of a federal statute or regulation. See *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997); *Ritter v. Cecil County Office of Housing*, 33 F.3d 323, 327-28 (4th Cir. 1994). The situation here is the reverse, however, so these cases are inapposite.

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That said, judicial deference to agency decisionmaking is not based solely on the fact that the agency is charged with administering the statute or regulation in question. The second justification for judicial deference is that the regulation in question falls within a complex area of particularized agency expertise. This justification still applies in this context. Regardless of whether the EPA is interpreting its own regulations or West Virginia's, antidegradation implementation procedures are undoubtedly a particularized area of law in which the EPA has unique experience and understanding.

While the parties have cited no caselaw outlining the proper standard for this court to use in reviewing the EPA's interpretation of the State's regulations, the court has found two cases that provide some limited guidance. The first case, *Montgomery National Bank v. Clarke*, 882 F.2d 87, 87-88 (3d Cir. 1989), involves the Office of the Comptroller of the Currency, a federal agency in charge of approving the expansion of national banks. In *Montgomery National Bank*, the Third Circuit explained

that under federal law, the Comptroller is authorized to approve a branch extension[*58] of a national bank if, among other things, "such establishment [is] authorized to State banks by the law of the State in question." *Id.* at 88 (quoting 12 U.S.C. § 36(c) (1982)). Under this statute, "the Comptroller must apply state branching laws when acting upon an application by a national bank to open a branch." *Id.* The plaintiff bank argued that the Comptroller had incorrectly interpreted a New Jersey statute when it approved a competitor bank's application to open a nearby branch. *Id.* at 90-92. The court rejected the bank's argument, in part because "an agency's reasonable interpretation of a statute that it administers, particularly to the extent that it rests on factual premises within its expertise, is entitled to judicial deference." *Id.* at 91. The court held that "this administrative law doctrine[, which] is usually applied to acts of Congress[,] ... also applies to a state statute that serves as a federal agency's rule of decision." *Id.* at 92. The courts will defer to the federal agency's reasonable interpretation of the state statute, the court held, so long as "the issue raised by the unsettled question of state law falls[*59] squarely within the federal agency's field of expertise and the state courts or state agency charged with administering the state statute have not ruled out the interpretation of the statute proffered by the federal agency." *Id.* at 92.

Montgomery National Bank is not directly analogous to the case at hand. In *Montgomery National Bank*, the Comptroller was charged by federal statute with interpreting and applying state law in the course of carrying out the Comptroller's own decisions regarding expansions of national banks. At least insofar as the Comptroller was making a decision to approve a branch office, the New Jersey statute was, in a sense, "a statute that [the Comptroller] administers." *Id.* at 91. Here, in contrast, the WVDEP is the agency charged with administering West Virginia's antidegradation procedures. The EPA's role is simply to determine whether those procedures are "consistent with" federal law. Even so, part of the rationale from *Montgomery National Bank* applies to this case, and suggests that the court should defer to the EPA's reasonable interpretation of West Virginia's regulations. As in *Montgomery National Bank*, the State regulations[*60] at issue here "fall squarely within the federal agency's field of expertise and the state courts or state agency charged with administering the [regulations] have not ruled out the interpretation of the [regulations] proffered by the federal agency." *Id.* at 92. In fact, in this case the WVDEP, a defendant-intervenor, has in its briefs explicitly approved of and adopted the EPA's interpretations of West Virginia's antidegradation procedures. See WVDEP Op. Br. at 1, 5, 6; Reply Br. at 4, 6, 7. See also *Western State Bank of St. Paul v. Marquette Bank Minneapolis*, 734 F. Supp. 889, 892-93

(*D. Minn.* 1990) (relying on *Montgomery National Bank* and deferring to federal Comptroller's reasonable interpretation of a Minnesota statute).

The second case on point is *Riverside Cement Co. v. Thomas*, 843 F.2d 1246 (9th Cir. 1988). In *Riverside Cement*, a cement company appealed a decision by the EPA interpreting a California regulation regarding permissible nitrogen oxide emission levels from cement kilns. *Id.* at 1247-48. The Ninth Circuit rejected the EPA's interpretation of the California regulation, holding that "EPA may either[*61] accept or reject what the state proposes; but EPA may not take a portion of what the state proposes and amend the proposal ad libitum." *Id.* at 1248. The court added that "EPA could not, [unless it decided to promulgate its own rules for the state] ... take upon itself the primary role Congress assigned to the states." *Id.* The court did not explicitly address whether the EPA's interpretation of the state regulation was entitled to deference. Instead, the court held that the EPA's interpretation was an impermissible modification of the state regulation. n22 *Id.* One judge dissented, arguing that "what we have in this case is a difference in interpretation of the state's Rule 1112 which the EPA approved." *Id.* at 1249. Because "EPA's interpretation is reasonable," the dissent argued, that interpretation "is entitled to deference." *Id.* at 1250.

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n22 The regulation in *Riverside Cement* provided that the discharge from a cement kiln could be no more than 3.1 pounds of nitrogen oxides per ton of clinker produced. *Id.* at 1247. The regulation went on to provide, however, that prior to the effective date of this standard, a public hearing would be held to review this limit. *Id.* If the evidence indicated that the 3.1 standard was not supported by evidence, then the emission level would be modified. *Id.* After the State delayed holding the hearing, the EPA interpreted this provision as "setting an absolute limit of 3.1 pounds without regard to the contingency built into the rule." *Id.* The majority described the rule, with its public hearing caveat, as "the bureaucratic equivalent of an illusory contract." *Id.*

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It is unclear whether the Riverside Cement majority concluded that it owed any deference to the EPA's interpretation of the California rule. It is clear, however, that regardless of the level of deference owed to the EPA's interpretation, the Riverside Cement majority found the EPA's interpretation unreasonable. The court called the EPA's interpretation an "amendment" to the regulation rather than a permissible interpretation and stated that the EPA could not "pretend" that the rule meant something other than what the rule said. *Id.* at 1248. Accordingly, both Montgomery National Bank and Riverside Cement are consistent with the rule that [HN19] the court should defer to a federal agency's reasonable interpretation of a state regulation, but that the agency is not permitted to effectively amend the regulation to give it a meaning that the text of the regulation does not fairly support. n23 Despite this court's reservations about judicial deference when the EPA is not the regulatory body charged with administering and enforcing those regulations, the court will defer to the EPA's reasonable interpretations of West Virginia's regulations in light of the EPA's[*63] particular knowledge and expertise in this area. The court will not, however, permit the EPA to effectively amend those regulations to mean something other than what the text of the regulation in question fairly supports. With this standard in mind, the court returns to the EPA's approval of section 5.6.c.

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n23 Because the WVDEP, not the EPA, is the agency charged with administering these regulations, it might plausibly be argued that the EPA can approve the State's proposed procedures only if any reasonable interpretation of those procedures renders them consistent with the Act and the EPA's regulations. Consider a State provision that could reasonably be read in a manner consistent with EPA regulations, and also could reasonably be read in a manner inconsistent with EPA regulations. If the EPA approved such a regulation, the EPA would run the risk that the State, the entity in charge of administering the regulation, would begin applying it in a manner inconsistent with EPA regulations. The EPA, having already approved the regulation, would have no further recourse. Moreover, the State is not bound by the EPA's interpretation of the State's procedures -- the EPA's role is limited to approving or disapproving the provisions as written, not amending it. The EPA has no authority to add any legally binding interpretation or modification to an approved State regulation. Because the State (like the

EPA) is free to interpret its own regulations however it wants, so long as its interpretation is reasonable, there would be no legal impediment to the State adopting a reasonable interpretation that was inconsistent with minimum federal requirements. Nonetheless, for the reasons given above, the court concludes that deference is appropriate in spite of this risk.

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Again, section 5.6.c provides that new or expanded discharges from publicly owned water treatment plants are exempt from Tier 2 review "only where there will be a net decrease in the overall pollutant loading discharged to the combined receiving waters." The EPA interprets this provision to mean that there must be a net decrease for each individual pollutant affected by the new or expanded discharge. The court concludes that the text of section 5.6.c does not reasonably support this interpretation, and that the EPA's gloss on section 5.6.c amounts to an impermissible attempt to amend the regulation. The critical flaw in the EPA's reading of section 5.6.c is that it cannot account for the meaning of the word "overall" in the regulation. If section 5.6.c provided that a wastewater treatment plant may be exempt "only where there will be a net decrease in the pollutant loading," then the regulation would be ambiguous as to whether the net decrease applied to each pollutant or to all pollutants taken together. n24 The term "net decrease" makes clear that the level of pollution must be lower after the new or expanded discharge than it was beforehand. The term "overall," then, can only reasonably[*65] mean that the "net decrease" applies to all pollutants considered together -- precisely what the plaintiffs and the EPA agree is impermissible. The presence of "overall" before the phrase "pollutant loading" removes any ambiguity regarding whether pollutant loading refers to each individual pollutant, or to all pollutants taken together. While the EPA argues that the terms "pollutant" or "pollutant loading" could reasonably be read to mean an individual pollutant or all pollutants together, neither the EPA nor the intervenors offer any plausible interpretation of the term "overall" that would make that term ambiguous. n25 The court concludes that the phrase "net decrease in the overall pollutant loading" unambiguously refers to a net decrease in the loading of all pollutants taken together, and the EPA's contention to the contrary is not a reasonable interpretation of section 5.6.c. Because the EPA agrees that this standard does not satisfy §

131.12(a)(2), the court concludes that the EPA's approval of section 5.6.c was arbitrary and capricious. n26

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n24 Alternately, the regulation could be written unambiguously in a manner consistent with EPA regulations: "only where there will be a net decrease in the pollutant loading for each parameter of concern."

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n25 In fact, it appears that the Municipal Intervenor do not share the EPA's and the WVDEP's interpretation of section 5.6.c. The Municipal Intervenor do not mention the EPA's position, but simply argue that section 5.6.c is permissible because "the State has conditioned the exemption on achieving a net decrease in overall pollutant loads, which demonstrates an environmental benefit" Mun. Br. at 9.

n26 The Municipal Intervenor raise several additional arguments for why section 5.6.c is permissible. First, they argue that the exemptions facilitate the elimination of serious public health risks, such that they would likely satisfy Tier 2 review if such review were required. *Section 131.12(a)(2)* does not, however, permit a State to bypass Tier 2 review for discharges that would significantly lower water quality simply because the State decides, ex ante, that such discharges would probably satisfy Tier 2 review anyway. Instead, all discharges that would significantly lower water quality on a Tier 2 water body must undergo Tier 2 review regardless of how likely it seems that the discharges will satisfy that review. Next, the Municipal Intervenor argue that section 5.6.c is permissible because notwithstanding any exemption from Tier 2, Tier 1 still ensures that existing uses will be protected. This argument is a non sequitur. It should go without saying that a State cannot fall short of the requirements of § 131.12(a)(2) simply because it is in compliance with § 131.12(a)(1). Finally, the Municipal Intervenor argue that protections in other West Virginia regulations "work together to ensure a Tier 2-type review despite the exemptions." Mun. Br. at 10. The question here, however, is whether West

Virginia's antidegradation implementation procedures satisfy minimum federal requirements, not whether other provisions of West Virginia law somehow make up the failings of those procedures. Moreover, § 131.12(a)(2) requires Tier 2 review in the appropriate circumstances, not "Tier 2-type review." These arguments are therefore without merit.

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4. Exempting activities under general section 402 & 404 permits

Section 60-5-3.7 of the West Virginia procedures provides that "regulated activities that are granted coverage by a WV/NPDES general permit will not be required to undergo a Tier 2 antidegradation review as part of the permit registration process." In approving this provision, the EPA stated that it interpreted this section "to require that some type of antidegradation review will be completed with the development of a general permit, or proposed reissuance, if the previous general permit had not undergone such a review. However, once the general permit is issued, such an antidegradation review would not be required for each applicant for coverage under the general permit." AR 109. Similarly, section 60-5-3.8 provides that "regulated activities that qualify for coverage under a Corps of Engineers regional or nationwide permit pursuant to *section 404* of the Federal [Clean Water] Act that has been certified by the state pursuant to *section 401 of the Federal Act* will not be required to undergo a Tier 2 antidegradation review, provided, however, that where an individual 401 certification is required, the Secretary[*68] [of the WVDEP] may require an appropriate antidegradation review." The plaintiffs contend that EPA regulations do not permit West Virginia to exclude new and expanded uses from individualized Tier 2 antidegradation review simply because those activities are covered by an NPDES or *section 404* permit. n27

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n27 The court will assume, for the sake of argument, that the EPA is correct when it asserts that the West Virginia regulations actually require antidegradation

review at the general permit stage. In fact, it is not at all clear that West Virginia's regulations require any antidegradation review for general permits. Section 3.7 provides that "new and reissued WV/NPDES general permits will be evaluated to consider the potential for significant degradation as a result of the permitted activity. Regulated activities that are granted coverage by a WV/NPDES general permit will not be required to undergo a Tier 2 antidegradation review as part of the permit registration process." While section 3.7 states that new and reissued general permits "will be evaluated to consider the potential for significant degradation," that section nowhere states that if significant degradation will result, Tier 2 review shall be applied. Thus, nothing in the regulations makes it clear that Tier 2 review need ever be applied to general NPDES permits. Section 3.8, governing *section 404* regional or general permits, does not even contain the requirement that these permits be evaluated for the potential of significant degradation. Instead, section 3.8 simply provides that activities covered by a *section 404* regional or nationwide permit are exempted from Tier 2 antidegradation review.

Thus, the court is skeptical of the EPA's claim that sections 3.7 and 3.8 require any antidegradation review for activities covered by NPDES or *section 404* permits. Nonetheless, because the plaintiffs do not press the point, the court will assume for present purposes that these sections do require antidegradation review at the time the general permit is issued.

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The plaintiffs' objections relate to general permits issued under two sections of the Clean Water Act: section 402, 33 U.S.C. § 1342, and section 404, 33 U.S.C. § 1344. A brief discussion of these sections and their permitting processes is necessary in order to put the plaintiffs' objections in context. Section 402 of the Clean Water Act establishes the National Pollutant Discharge Elimination System (NPDES). See 33 U.S.C. § 1342. Generally speaking, section 402 authorizes the EPA to issue, "after opportunity for public hearing, ... a permit for the discharge of any pollutant upon condition that the discharger meet the applicable 'best technology' effluent requirements." William H. Rodgers, Jr., *Environmental Law* § 4.26 (1991) [hereinafter *Rodgers*, *Environmental*

Law]. *Section 402(b)* provides a mechanism whereby states can take over the NPDES permit program from the EPA, provided that the State program meets minimum federal standards. See 33 U.S.C. § 1344(b). West Virginia administers its own NPDES permit program.

The EPA has interpreted *section 402* to allow for the issuance[*70] of general NPDES permits. See 40 C.F.R. § 122.28. A general permit is a single NPDES permit that covers a number of individual discharges that would otherwise require individual NPDES permits. See *id.* General permits may be issued for, among other things, facilities that involve the same or similar operations, that discharge the same types of waste, or that require the same or similar type of monitoring. See *id.* General permits may cover a specified geographical area, which can be as large as an entire state. See *id.* Significantly, general permits can cover not only a specified class of existing discharges, but also new discharges in the future that fall within the class. When an individual seeks to engage in an activity of the type covered by a general permit, that individual simply applies for coverage under the general permit by filing a written "notice of intent" rather than applying for an individual permit. See 40 C.F.R. § 122.28(b)(2)(i). The benefit of the general permit process for individual dischargers is that approval is substantially quicker and less expensive than applying for an individual NPDES[*71] permit. On the other hand, there is a danger that the general permit process could be used to circumvent entirely the individualized assessments contemplated by the individualized permit system. n28

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n28 As one commentator put it: "There is something about a nationwide permit, like a mass conversion or a universal truth, that sounds extravagant and presumptuous; would you recommend a single dog license for all the mongrels in the state?" Rodgers, *Environmental Law* § 4.12.

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Section 404 of the Act carves out for special treatment a particular type of water pollution. In *section 404*, Congress singled out "the discharge of dredged or fill materials into navigable waters" and gave the Army

Corps of Engineers the authority to issue permits for this type of discharge. 33 U.S.C. § 1344. See also Rodgers, Environmental Law § 4.12. In 1977, Congress amended the Act to permit the issuance of "general permits." 33 U.S.C. § 1344(e); Rodgers, Environmental Law[*72] § 4.12. Under section 404(e), the Corps may:

after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.

33 U.S.C. § 1344(e). As with general permits under section 402, individuals discharging the type of pollutant covered by a general section 404 permit need not apply for an individual section 404 permit, but may seek coverage under an existing nationwide or regional section 404 permit. See 33 C.F.R. § 330.1.

The plaintiffs argue that EPA regulations do not permit Tier 2 antidegradation review to occur only at the time a general section 402 or section 404 permit is issued, but instead require antidegradation review for each individual use covered by such a general permit. The plaintiffs point to an EPA statement in its 1998 ANPRM that:

It[*73] is the position of EPA that, at a minimum, States ... must apply antidegradation requirements to activities that are "regulated" under State ... or federal law (i.e., any activity that requires a permit or a water quality certification pursuant to State ... or federal law, such as CWA § 402 NPDES permits or CWA § 404 dredge and fill permits).

63 Fed. Reg. 36,7432, 36,780; AR 553. According to the plaintiffs, this statement means that any activity requiring a section 402 or section 404 permit must, on an individualized basis, be subjected to antidegradation review. In response, the EPA argues that conducting Tier 2 review at the general permit stage is consistent with its prior statement. According to the EPA, the fact that "States ... must apply antidegradation requirements to ... any activity that requires a ... CWA § 402 NPDES permit[] or CWA § 404 dredge and fill permit[]," id., does not mean that antidegradation review cannot be done at the general permit stage. The court agrees with the EPA that this statement can reasonably be read to permit antidegradation review of a general permit rather than review of each individual use under that permit. [*74]

The plaintiffs seek further support for their position by pointing to EPA actions in similar contexts. For example, in November of 2000 the EPA issued a general NPDES permit for water treatment facilities in Massachusetts and New Hampshire. See *Final NPDES General Permits for Water Treatment Facility Discharges in the States of Massachusetts and New Hampshire*, 65 Fed. Reg. 69,000 (November 15, 2003). The EPA explained that the general permit "does not apply to any new or increased discharge to other waters unless the discharge is shown to be consistent with the state's antidegradation policies." 65 Fed. Reg. 69,000, 69,003. In particular, "EPA will not authorize these discharges under the general permit until it receives a favorable antidegradation review and certification from the States." Id. Thus, contrary to its approach here, the EPA required each additional new or expanded use seeking coverage under the general permit first to undergo individualized antidegradation review.

Similarly, in September of 2000 the EPA issued a general permit for storm water discharges from industrial facilities. See *Final Reissuance of National Pollutant Discharge[*75] Elimination System (NPDES) Storm Water Multi-Sector General Permit for Industrial Activities*, 65 Fed. Reg. 64,746 (Oct. 30, 2000). This general permit covers most areas of the United States where the NPDES program has not been delegated to the States. 65 Fed. Reg. 64,746, 64,746. As part of this general permit, the EPA addressed an objection by a commenter concerned with how Tier 2 review would be conducted in relation to activities under the permit. The EPA responded as follows:

The commenter correctly recognizes the difficulty in determining what defines "necessary to accommodate important economic or social development" in accordance with 40 CFR Section 131.12(a)(2). By statute, this determination involves public participation, the assurance that water quality will be protected, and several other factors. EPA would have to modify the permit for each discharge in question in order to comply with 40 CFR Section 131.12(a)(2). Individual considerations such as these are contrary to the concept of a general permit. In addition, public participation would be impossible since the permit issuing authority[*76] would not know about the particular discharge to tier 2 waters before a NOI [notice of intent] was submitted. Therefore, a facility operator must seek coverage under an individual permit to discharge to tier 2 waters under 40 CFR Section 131.12(a)(2)'s allowable degradation provisions to satisfy the requirements for public participation and protection of water quality. The only discharges allowed coverage under today's permit are those which do not degrade the use of a tier 2 water below its existing levels, even though those existing levels exceed levels necessary to support propagation of

fish, shellfish and wildlife and recreation in and on the water.

65 *Fed. Reg.* 64,746, 64,793-94. In this passage, the plaintiffs argue, the EPA clearly states the reasons why Tier 2 antidegradation review cannot be performed on a general permit-wide basis, but must be performed on each individual discharge under a general permit.

The EPA argues that its statements regarding these other general permits are inapposite. The September 2000 storm water permit, the EPA argues, covered discharges from many industrial facilities in numerous states, such[*77] that the EPA could not make a blanket antidegradation determination for so many discharges in such a large area. The court does not find this distinction persuasive. General state-wide NPDES permits also cover many separate discharges from different facilities in a large and varied geographical area -- the entire state of West Virginia. General *section 404* permits cover many separate discharges over even larger areas, such as the entire nation. The EPA does not explain why the difficulties that were present in making blanket antidegradation determinations for these general permits are not also present for general permits in West Virginia.

In the alternative, the EPA argues that either approach is a permissible interpretation of EPA regulations. That is, while it was a reasonable interpretation of EPA regulations for the EPA to require antidegradation review on an individualized basis, it is also reasonable simply to require antidegradation review on a general permit-wide basis. This argument has more force. [HN20] Inherent in the notion of an agency's discretion to interpret its own regulations is the idea that an agency may adopt any one of various reasonable interpretations of that regulation.[*78] An agency's prior choice of one reasonable interpretation does not preclude the agency from reconsidering its position in light of its ongoing experience and accumulated knowledge and adopting another reasonable interpretation. See *Rust v. Sullivan*, 500 U.S. 173, 186-87, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991). That said, the EPA's interpretation of its regulations must still be a reasonable one.

As noted above, in regards to its September 2000 storm water general permit, the EPA stated that "individual considerations [required for Tier 2 review] such as [evaluating economic or social development in the area in which a water body is located] are contrary to the concept of a general permit." 65 *Fed. Reg.* 64,746, 64,794. The EPA also explained that "public participation [as required by *section 131.12(a)(2)*] would be impossible since the permit issuing authority would not know about the particular discharge to tier 2 waters before a NOI was submitted." *Id.* (emphasis added). The

EPA offers no explanation for why these same objections are not equally applicable to West Virginia's procedures here. [HN21] Under § 131.12(a)(2), water quality cannot[*79] be lowered unless doing so is "necessary to accommodate important economic or social development in the area in which the waters are located." This standard, by its terms, is location-specific. When a general permit is issued under *section 402* or *section 404*, the State simply does not know the specific locations of discharges that might be covered by the general permit; discharge locations are not known until individuals seek permission to discharge under the general permit. In light of this fact, the court does not understand how the State could determine, at the time the general permit is issued, that each potential discharge that might some day be covered by the general permit is "necessary to accommodate important economic or social development in the area in which the waters are located." § 131.12(a)(2) (emphasis added). The EPA has not explained how, before the fact, the State could determine whether a given discharge was associated with "important" economic or social development or whether, in the particular area in which the affected waters are located, lowering water quality was "necessary" for such development. Nor has the EPA explained how the State could hold a meaningful[*80] public participation process regarding potential degradation of the State's waters prior to the time when members of the public were aware of the nature and location of specific discharges covered by the permit - something the EPA previously deemed "impossible."

The EPA argues that it has frequently promulgated complex rules under the Clean Water Act and other statutes, such as the National Toxics Rule, that are applicable in large geographical areas. See 57 *Fed. Reg.* 60848 (Dec. 22, 1992). The EPA argues that in many of these cases, the analyses, determinations, and assurances required are just as complex as those that would be required for Tier 2 antidegradation review of general permits. The EPA also notes that it has issued general permits, such as its General Permit for Eastern Gulf of Mexico, that cover large geographical areas and take into account many site-specific factors. See 63 *Fed. Reg.* 55718 (Oct. 16, 1998). The court has no reason to doubt that complex environmental regulation can be done (and has been done) on a large geographical basis, taking into account various local concerns. The court's focus here, however, is whether the specific[*81] type of review called for in § 131.12(a)(2) can be done on a general level. On that particular question, the EPA has not explained how "determining what defines 'necessary to accommodate important economic or social development' ... [which] involves public participation, the assurance that water quality will be protected, and several other factors," can be done at the general permit

stage. 65 Fed. Reg. 64,746, 64793. Nor has the EPA explained why it is not true here, as it was for its September 2000 storm water discharge general permit, that "public participation would be impossible since the permit issuing authority would not know about the particular discharge to tier 2 waters before a NOI was submitted." 65 Fed. Reg. 64,746, 64794. The court is not implying that once the EPA has interpreted its regulation in one manner, it can never reconsider the matter and adopt another, equally reasonable interpretation of that regulation. On the contrary, [HN22] "a[n agency's] revised interpretation deserves deference because 'an initial agency interpretation is not instantly carved in stone.'" *Rust*, 500 U.S. at 186 (quoting *Chevron*, 467 U.S. at 863).[*82] Nonetheless, there is "'at least a presumption that [an agency's] policies will be carried out best if the settled rule is adhered to.'" *Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983) (quoting *Atchison, Topke & Sante Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808, 37 L. Ed. 2d 350, 93 S. Ct. 2367 (1973)). As such, an agency must "justify [its] change of interpretation with a 'reasoned analysis'" for that change. *Rust*, 500 U.S. at 187 (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42).

While this court is mindful of the deference it owes to the EPA's reasonable interpretations of its own regulations, the EPA has not explained how the type of review called for in § 131.12(a)(2), which is location-specific and requires public participation, can be done on a statewide or nationwide basis. The EPA's statements in relation to the September 2000 storm water discharge general permit do not pertain to how the language of § 131.12(a)(2) can reasonably be interpreted. Rather, those statements pertain to whether, as a practical [*83]matter, it is possible to conduct Tier 2 review when a general permit is issued, prior to the identification and evaluation of specific discharges into specific waters. In September of 2000 the EPA stated that such review was not possible. The EPA has not explained how circumstances have changed to render such review possible today. Based on the current record, the EPA has failed to offer a reasoned analysis, or a reasonable factual basis, to justify the change in its opinion that Tier 2 antidegradation review could not feasibly be performed at the general permitting stage. Accordingly, the court concludes that the EPA's approval of section 60-5-3.7, which does not require Tier 2 antidegradation review for discharges under a general section 402 or section 404 permit, except (arguably) at the time the general permit is issued, was arbitrary and capricious.

5. Allowing the degradation of Tier 2 waters from point sources after Tier 2 review so long as best management

practices for nonpoint sources are installed and maintained

The plaintiffs next object to the treatment of nonpoint sources in the West Virginia regulations. [HN23] The Act defines a "point source" as "any discernible, [*84] confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). A "nonpoint source," in contrast, is "unchanneled and uncollected surface runoff." *Shanty Town Assocs. Ltd. P'ship v. EPA*, 843 F.2d 782, 785 n.2 (4th Cir. 1988). In the Clean Water Act, "Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the Act to regulate only the former." *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976). All parties agree, then, that the EPA has no authority under the CWA to regulate nonpoint sources directly. That fact notwithstanding, [HN24] EPA regulations indirectly place certain limits on nonpoint source pollution. Under Tier 2, water quality may be lowered after a process of public participation and a determination that allowing lower water quality is necessary for important economic or social development. Even when this is the case, [*85] however, there are additional conditions that must be met before water quality in a Tier 2 water may be lowered. Among other things, "the State shall assure that there shall be achieved ... all cost-effective and reasonable best management practices for nonpoint source control." 40 C.F.R. § 131.12(a)(2). Thus, States are not required to regulate nonpoint source control, but if a State does not assure that best management practices are achieved for nonpoint source control, the State cannot permit the lowering of water quality from point sources on any Tier 2 water, economic or social necessity notwithstanding.

Nonpoint source control is addressed in section 60-5-1.5.b of the West Virginia regulations. Under section 1.5.b, "nonpoint source activities will be deemed to be in compliance with antidegradation requirements with the installation and maintenance of cost-effective and reasonable best management practices" The plaintiffs argue that this rule is inconsistent with EPA regulations because nonpoint source activities are deemed to be in compliance so long as best management practices are installed and maintained, whereas the EPA's regulation requires[*86] that the State assure that best management practices be achieved. In response, the EPA argues that it was reasonable for it to conclude that requiring the installation and maintenance of best management practices satisfies the standard that best management practices be achieved. The court agrees. In common parlance, saying that certain practices must be "installed

and maintained" is roughly equivalent to saying that those practices must be "achieved." The plaintiffs have not explained why, in the context of best management practices for nonpoint source control, there is any significant gap between these two notions. Accordingly, it was reasonable for the EPA to conclude that if best management practices are installed and maintained, then best management practices will be achieved.

6. Discretion afforded WVDEP to exempt "types or classes of activities" from Tier 2 review

Section 60-5-5.6.c provides that "the Secretary [of the WVDEP] may determine that certain types or classes of activities should be exempt from Tier 2 review after balancing the relative impact of the activities on water quality against the overall benefit of the activities to public health and[*87] welfare or the environment." The plaintiffs contend that this provision is flatly inconsistent with EPA regulations, which do not provide for blanket exemptions for classes of activities that may impact water quality. In its approval of this provision, the EPA clarified that "any such exemptions are subject to EPA review under *Section 303(c) of the Clean Water Act* prior to being implemented." AR 110. Accordingly, the EPA argues that section 5.6.c simply preserves West Virginia's right to amend its antidegradation rules, subject to EPA approval, which is a power afforded West Virginia under the Clean Water Act regardless of whether section 5.6.c appears in West Virginia's antidegradation procedures or not. According to the EPA, "section 5.6.c merely serves as a notice and reservation of West Virginia's ability to act [under *section 303(c) of the Clean Water Act*] but does not give West Virginia any additional authority." EPA Op. Br. at 30.

The question, then, is whether it is reasonable for the EPA to interpret section 5.6.c as nothing more than a State codification of the procedures for revising water quality standards already available under *section 303(c) of the Act*. The first[*88] obvious problem with section 5.6.c is that it nowhere makes reference to EPA approval of a new exemption. The provision does not require the Secretary to submit any proposed exemption to the EPA or condition the validity of any proposed exemption on EPA approval. If section 5.6.c were simply a restatement of West Virginia's pre-existing rights to revise its water quality standards under *section 303(c)*, it would have to contain some reference to EPA approval. While the EPA stated in its approval letter that "any such exemptions are subject to EPA review under *Section 303(c) of the CWA*," the EPA does not explain why this statement in its approval letter has any legal force.

In addition, the procedures set out in section 5.6.c for the Secretary to issue an exemption do not satisfy the procedures required by *section 303(c)* for a State to revise a water quality standard. Under section 5.6.c, "where the agency tentatively determines to grant an exemption under this provision, notice of this determination must be included in any required public notice, such as public notice required prior to issuance of an NPDES permit. The Secretary's final determination is a final decision and subject[*89] to appeal to the Environmental Quality Board." *Section 303(c) of the Clean Water Act* provides that "the State water pollution control agency of [a] State shall from time to time (but at least once [every] three year[s] ...) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator." 33 U.S.C. § 1313(c)(1). In addition, "whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator." Id. at § 1313(c)(2)(A). The EPA Administrator then has sixty days to approve the standard or ninety days to disapprove it. Id. at § 1313(c)(3).

While section 5.6.c provides for public notice, it does not provide for "public hearings," as required by *section 303(c)*, prior to the Secretary's adoption of the new standard. Furthermore, public notice of a possible new exception need only "be included in any required public notice." Section 5.6.c (emphasis added). That is, public notice of a new exception to Tier 2 review is required only when public notice is[*90] otherwise required for the agency's action. Under this standard, the Secretary need not give any public notice of a new exception to Tier 2 review unless that exception was granted as part of an action otherwise requiring public notice. Finally, *section 303(c)* provides that [HN25] "whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to *section 1317(a)(1)* of this Act for which criteria have been published under *section 1314(a)* of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses." 33 U.S.C. § 1313(c)(2)(B). Contrary to the CWA, section 5.6.c does not require the Secretary to adopt criteria for toxic pollutants identified by the EPA in the course of granting new exceptions to Tier 2 review. n29

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n29 The failure of section 5.6.c to require EPA approval is all the more striking in light of the fact that section 5.6.c does set out the procedures for adopting a new exception to Tier 2 review, but does not mention EPA approval in those procedures.

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In light of the fact that section 5.6.c does not require the Secretary to submit any new exceptions to the EPA for approval, and the fact that the procedures required by section 5.6.c for promulgating a new exception do not satisfy the procedures required by *section 303(c)* for revising water quality standards, the court concludes that the EPA's position that section 5.6.c does not afford the State any new powers not already granted under *section 303(c)* is unreasonable and contrary to the plain meaning of section 5.6.c. Accordingly, the EPA's approval of section 5.6.c was arbitrary and capricious.

7. Standards used for establishing when Tier 2 review is required

(a) Section 60-5-5.2

Section 60-5-5.2 provides that "water segments that support the minimum fishable/swimmable uses and have assimilative capacity remaining for some parameters shall generally be afforded Tier 2 protection." The plaintiffs argue that the word "generally" renders this provision inconsistent with EPA regulations, which require Tier 2 protection in all cases where the water segment supports minimum fishable/swimmable uses and has assimilative capacity remaining for some parameters.

The EPA responds[*92] by stating that it understands the word "generally" to mean that all such waters shall be given Tier 2 protection "except as otherwise specifically provided in West Virginia's implementation procedures." EPA Op. Br. at 34. Except as specified elsewhere, the EPA states, the term "generally" does not mean that WVDEP may exclude waters meeting this standard. As an example of a West Virginia regulation that does "provide otherwise," the EPA cites section 60-5-5.4. Under section 5.4, where there is insufficient evidence to classify a water body, a regulated entity may seek a Tier 1 designation by submitting water quality data showing

that "there is no remaining assimilative capacity for any parameter to be affected by [the entity's] activity."

The court does not understand, however, why this example illustrates the need for the word "generally." According to the EPA, the word "generally" simply means that "water segments that support the minimum fishable/swimmable uses and have assimilative capacity remaining for some parameters" shall be afforded Tier 2 protection, except when another section of the implementation procedures provides otherwise. Section 5.4, however, does not "provide[*93] otherwise." Section 5.4 permits a regulated entity to seek a Tier 1 designation by submitting data that the water body has no remaining assimilative capacity for those parameters that will be affected. Thus, when a regulated entity satisfies section 5.4 by submitting data showing that the water body lacks remaining assimilative capacity, the regulated entity has simply demonstrated that the water body is not a "water segment[] that support[s] the minimum fishable/swimmable uses and has assimilative capacity remaining for some parameters." That is to say, when the requirements of section 5.4 are met, the water body in question no longer meets the terms of section 5.2, and no exception to section 5.2's general terms is necessary. According to the EPA, the term "generally" is needed only to make clear that activities that would otherwise fall within the ambit of section 5.2 are excluded if they are exempted by another provision. But waters classified as Tier 1 under section 5.4 would not otherwise fall within the ambit of section 5.2.

Section 5.2 itself also purports to contain an example of a water body that meets the general terms of section 5.2 but is otherwise excluded. Section [*94]5.2 states, "for example, a water segment listed on the state's 303(d) impaired waters list can qualify for Tier 2 protection, but where the impairment ... results in failure to attain minimum uses, that water segment will be afforded only Tier 1 protection." Again, this example does not illustrate any need for the word "generally." Even when a water body has only one impairment, if that impairment results in a failure to attain minimum uses, then that water body does not "support the minimum fishable/swimmable uses and have assimilative capacity remaining for some parameters." Like a water body covered by section 5.4, the type of water described in this part of section 5.2 would not otherwise fall within the ambit of section 5.2's general definition of a Tier 2 water body. Accordingly, there is no need to qualify that general definition with the term "generally."

The parties have not identified, and this court has not discovered, any other provisions of West Virginia's antidegradation implementation procedures that exempt from Tier 2 protection a water body that supports

minimum fishable/swimmable uses and has remaining assimilative capacity for some parameters. Accordingly, the[*95] court concludes that the EPA's explanation of the meaning of the word "generally" in section 5.2 is not a reasonable interpretation of that provision. As such, the EPA's approval of section 5.2 was arbitrary and capricious.

(b) Section 60-5-5.3

Section 60-5-5.3 provides that

where a water segment does not meet or exceed applicable water quality criteria for every parameter, the Secretary will determine whether the water segment will be afforded Tier 2 protection as part of the antidegradation review process using best professional judgment. In addition to data available for review, the Secretary may consider factors such as (1) existing aquatic life uses, (2) existing recreational or aesthetic uses, (3) existing water quality data for upstream segments or comparable segments, (4) biological score for the water segment, and (5) the overall value of the segment from an ecological, health and public use perspective.

This provision, the plaintiffs argue, is also inconsistent with EPA regulations because it gives the WVDEP discretion to deny Tier 2 protection to any water body if any single parameter violates water quality standards, even if that water body supports[*96] fishable/swimmable uses and its other parameters meet or exceed levels necessary to support those uses. In particular, the plaintiffs note that the EPA previously expressed its disapproval of a proposed provision that "if any parameter exceeds water quality standards," then the water body is automatically designated as Tier 1. The plaintiffs argue that the current provision, which states that the WVDEP shall make a discretionary designation where any water does not meet or exceed levels necessary to support designated uses for all criteria, is simply a restatement of this previously-rejected approach.

The EPA argues that this provision merely reflects the water body-by-water body approach to Tier 2 classifications. The water body-by-water body approach, the EPA notes, depends on an overall evaluation of the water body in light of a number of factors. Accordingly, the EPA argues, West Virginia's regulations may permit the WVDEP discretion in determining whether a water body that has assimilative capacity for some parameters is, overall, a high quality water body. The court agrees with the EPA that section 5.3 is not simply a restatement of the previously-rejected rule that if a water[*97] body exceeded relevant levels for any one parameter, that

water body is automatically designated as Tier 1. Section 5.3 contains no similar provision for automatic designation as Tier 1 or Tier 2. When a water body does not meet at least one criteria, the Secretary then makes a case-by-case determination of whether that water body is, overall, a high quality water body. For example, even when a given water body exceeds water quality standards for many criteria, if that water body has high levels of one or two pollutants that prevent the stream from supporting aquatic life, it may well be reasonable to determine that the water body is not, overall, a high quality water. This feature distinguishes the water body-by-water body approach from the pollutant-by-pollutant approach: certain water bodies that are not overall of high quality will not be afforded Tier 2 protection for any parameter, even though some parameters do exceed levels necessary to support minimum uses.

While the plaintiffs' discussion of section 5.3 is contained in the same section as its discussion of section 5.2, the court finds those objections better taken as against section 5.2 than section 5.3. The court[*98] has already agreed with the plaintiffs that EPA regulations require that "water segments that support the minimum fishable/swimable uses and have assimilative capacity remaining for some parameters shall ... be afforded Tier 2 protection," section 5.2 (emphasis added), and that West Virginia's caveat that such protection shall only "generally" be afforded is not permissible. But when these two conditions are not met -- when the water segment either does not support the minimum fishable/swimable uses, or when the water segment does not have assimilative capacity remaining for some parameters -- then it is consistent with the EPA's regulations to permit the WVDEP the discretion to determine whether such waters are overall of a high quality or not. Accordingly, the court concludes that the EPA's approval of section 5.3 was reasonable, not arbitrary or capricious.

8. Tier 2 De Minimis Standard

Section 60-5-5.6.a.1 states that Tier 2 antidegradation review is required for activities on Tier 2 waters "that would significantly degrade water quality." Section 5.6.d clarifies that "degradation for Tier 2 shall be deemed significant if the activity results in a reduction[*99] in the water segment's available assimilative capacity (the difference between the baseline water quality and the water quality criteria) of ten percent or more ... for parameters of concern." In addition, "degradation will also be deemed significant if the proposed activity, together with all other activities allowed after the baseline water quality is established, results in a reduction of the water segment's available assimilative capacity of 20% or more ... for the parameters of

concern." The plaintiffs contend that these provisions, establishing a percentage reduction of assimilative capacity that will not trigger Tier 2 review, are inconsistent with EPA regulations.

According to the plaintiffs, Tier 2 simply does not allow "lower water quality" without a public hearing and finding of economic or social necessity. The EPA responds that its regulations do not specifically define "lower water quality." Moreover, the EPA argues, in the absence of statutory or regulatory language to the contrary, courts have generally held that an administrative agency has inherent authority to make de minimis exceptions to statutory or regulatory standards. In *Alabama Power Co. v. Costle*, 204 U.S. App. D.C. 51, 636 F.2d 323 (D.C. Cir. 1979),[*100] the D.C. Circuit held that "exemptions may ... be permissible as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered de minimis." *Id.* at 360. See also *Ober v. Whitman*, 243 F.3d 1190, 1193-95 (9th Cir. 2001) (holding that even though the Clean Air Act "makes no explicit provision for a 'de minimis' exception," the EPA had the discretion to "exempt de minimis sources of PM-10 from pollution controls."); *Environmental Defense Fund, Inc. v. EPA*, 317 U.S. App. D.C. 207, 82 F.3d 451, 466-67 (D.C. Cir. 1996) (endorsing de minimis exceptions in the absence of express statutory language to the contrary). A noted commentator summarized the caselaw with the following "default rule" for agency authority to craft de minimis rules: "Unless Congress has clearly said otherwise, agencies will be permitted to make de minimis exceptions to statutory requirements by exempting small risks from regulatory controls." Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 *Mich. L. Rev.* 1651, 1668 (2001).

The first question, then, is whether the EPA's regulation rules out the possibility[*101] of a de minimis lowering of water quality. The plaintiffs cite several cases where courts held that no de minimis exceptions were permissible. See, e.g., *Natural Resources Defense Council, Inc. v. EPA*, 263 U.S. App. D.C. 231, 824 F.2d 1211, 1216 (D.C. Cir. 1987); *North Carolina v. FERC*, 324 U.S. App. D.C. 209, 112 F.3d 1175, 1186 (D.C. Cir. 1997). The statutory or regulatory provisions in these cases, however, are distinguishable from the language of § 131.12(a)(2). For example, in NRDC the court considered the EPA's interpretation of the Drinking Water Act. The Act "directs the Administrator to establish a recommended level for 'each contaminant which, in his judgment ... may have any adverse effect on the health of persons.'" *NRDC*, 824 F.2d at 1216 (quoting 42 U.S.C. § 300g-1(b)(1)(B)) (emphasis in *NRDC*). Industry groups argued that this language

compelled the the EPA to make a finding of significant risk to human health prior to regulating a particular contaminant. *Id.* at 1215. The court disagreed, noting that the language "may have any adverse effect" was "inconsistent with a requirement[*102] that the Administrator make a threshold finding of significant risk; a contaminant may have some adverse effect on the health of persons without posing a significant risk to human health." *Id.* at 1216. Similarly, the D.C. Circuit recently expressed "serious reservations concerning FERC's attempt to redefine the statutory phrase 'any discharge,' 33 U.S.C. § 1341(a)(1), to mean only those discharges that are 'material,' 18 C.F.R. § 4.38(f)(7)(iii)." *North Carolina*, 112 F.3d at 1186 (emphasis added). In this case, § 131.12(a)(2) [HN26] does not require Tier 2 prior to "allowing any lowering of water quality." Rather, § 131.12(a)(2) requires Tier 2 review prior to "allowing lower water quality." Elsewhere the regulation speaks in terms of "degradation or lower water quality," but does not say "any degradation or any lower water quality."

In *Alabama Power*, the court provided further explanation of the nature of a permissible de minimis exception: "the ability, which we describe here, to exempt de minimis situations from a statutory command is not an ability to depart from the statute, but rather[*103] a tool to be used in implementing the legislative design." 636 F.2d at 360. In particular, "there is likely a basis for an implication of de minimis authority to provide exemption when the burdens of regulation yield a gain of trivial or no value. That implied authority is not available for a situation where the regulatory function does provide benefits, in the sense of furthering the regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs." *Id.* at 360-61. In this case, nothing in the EPA's regulation prohibits a de minimis exception from Tier 2 review when water quality is lowered only a "trivial" amount. Indeed, the EPA has previously stated that some de minimis amount of degradation may be permitted without triggering Tier 2 review. In its 1998 ANPRM, the EPA stated that "where the degradation is not significant, the antidegradation review is typically terminated for that proposed activity," and that "applying antidegradation requirements only to activities that will result in significant degradation is a useful approach that allows States ... to focus limited resources where they may result in the greatest[*104] environmental protection." 63 *Fed. Reg.* 36,742, 36,783; AR 556. The court concludes that the EPA's regulation does not preclude a State from permitting some de minimis amount of pollution prior to imposing Tier 2 review.

In the alternative, the plaintiffs argue that even if some de minimis exception is permissible, the specific levels

approved by the EPA in this case -- ten percent reduction in assimilative capacity for a single source and twenty percent reduction in assimilative capacity for cumulative sources -- are not permissible because the levels are not justified by any evidence in the record. The D.C. Circuit in *Alabama Power* stated that "determination of when matters are truly de minimis naturally will turn on the assessment of particular circumstances, and the agency will bear the burden of making the required showing." 636 F.2d at 360. In the 1998 ANPRM, the EPA cautioned against States using "a high threshold of significance," which could "unduly restrict[] the number of proposed activities that are subject to a full antidegradation review." 63 Fed. Reg. 36,742, 36,783; AR 556. The EPA also warned against procedures[*105] that do "not adequately prevent cumulative water quality degradation." Id. n30

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n30 The EPA stated that "the current regulation does not specify a significance threshold," and that "a clear national norm regarding this 'significance test' is necessary and should be developed and established either in the regulation or national guidance." Id. Despite this statement, the EPA apparently has not yet established any such national norm.

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In support of the Tier 2 de minimis levels in the West Virginia implementation procedures, the EPA cites its Water Quality Guidance for the Great Lakes System: Supplementary Information Document (Great Lakes SID). In the Great Lakes SID, issued in March of 1995, the EPA addressed de minimis degradation in the Great Lakes Ecosystem. The EPA provided that States could categorize as de minimis any discharge of non-bioaccumulative chemicals of concern (non-BCCs) that took up "less than 10 percent of the available assimilative capacity." Great Lakes SID at 207; AR 460. [*106] The EPA justified the de minimis provision by stating that:

Although de minimis provisions do involve non-conservative assumptions, the de minimis provisions included in the proposed Guidance are not likely to seriously undermine the protection afforded a high

quality water body through antidegradation. De minimis provisions provide a means for States ... to differentiate between actions that will result in an increased loading of a pollutant to a receiving water that is likely to have a significant impact on water quality and those that are unlikely to do so and focus review efforts on actions that will degrade water quality. It is reasonable to assume that loading increases of non-BCCs that will use less than ten percent of the remaining assimilative capacity in a water body will have a negligible effect on ambient water quality.

Great Lakes SID at 208; AR 461. The plaintiffs point out that West Virginia's de minimis provision applies to all pollutants, including BCCs, which were specifically exempted by the EPA in the Great Lakes SID. In fact, in that document the EPA rejected the argument that the de minimis provisions should include BCCs, stating that: [*107]

EPA does not agree that even small increases in the loadings of BCCs to the Great Lakes Basin can be considered de minimis. Low levels of BCCs in the Great Lakes have adverse impacts on the organisms that inhabit them. Further, because BCCs are both resistant to degradation and hydrophobic, they tend to accumulate in sediments and biota, amplifying their effects. For these reasons, even small increases in loadings of this type of pollutant must be considered significant.

Great Lakes SID at 208-09; AR 461-62. In light of this document, the plaintiffs argue, it is at the very least impermissible for West Virginia to include BCCs in its ten percent/twenty percent de minimis provision.

The EPA responds that the term "BCCs" was created during the Great Lakes Initiative to categorize pollutants that are particularly harmful to the Great Lakes ecosystem. This determination, the EPA argues, depended on the unique nature of that ecosystem, which is quite different than that found in West Virginia. The record supports the EPA's contention in this regard. In the Final Water Quality Guidance for the Great Lakes System, the EPA explained that "the final Guidance ... reflects[*108] the unique nature of the Great Lakes Basin Ecosystem" *Final Water Quality Guidance for the Great Lakes System*, 60 Fed. Reg. 15,366, 15,369 (March 23, 1995); AR 393. For example, "the internal responses and processes that operate in the Great Lakes because of their depth and long hydraulic residence times cause pollutants to recycle between biota, sediments and the water column." 60 Fed. Reg. 15,366, 15,367; AR 391. Given "the physical, chemical and biological characteristics of the Great Lakes," the EPA "devoted considerable effort to indentifying the chemicals of most concern to the Great Lakes System -- persistent,

bioaccumulative pollutants termed 'bioaccumulative chemicals of concern (BCCs)' -- and developing the most appropriate criteria, methodologies, policies, and procedures to address them." 60 Fed. Reg. 15,366, 15,369; AR 393. This document supports the EPA's position that pollutants classified as BCCs in the Great Lakes Guidance posed a particular danger to the Great Lakes in light of that ecosystem's unique characteristics, which are not present in West Virginia's waterways.

In light of all this, the court defers to the EPA's[*109] conclusion, which the court finds reasonable in light of the evidence in the record, that its regulations allow West Virginia to include a de minimis provision of up to ten percent of the available assimilative capacity for any given pollutant.

The same cannot be said for the EPA's approval of West Virginia's twenty percent de minimis provision for cumulative discharges. From the perspective of maintaining the water quality of a Tier 2 water body (which is the focus of § 131.12(a)(2)), the de minimis standard for cumulative discharges is more important than the de minimis standard for individual discharges; it is the former that will dictate the total reduction in available assimilative capacity that a water body may undergo without any Tier 2 review. n31 Without a cumulative cap on de minimis discharges, individual de minimis discharges could easily consume all of the available assimilative capacity for a given pollutant parameter, reducing water quality to the minimum level necessary to support existing uses without ever having undergone Tier 2 review. As for this twenty percent de minimis figure -- clearly the more important of the two -- the EPA has[*110] cited no evidence in the record to explain why a twenty percent reduction in available assimilative capacity can still be considered insignificant. The EPA argues that West Virginia's de minimis thresholds "were developed in accordance with EPA's recommendations, which were formulated after many years of intense effort by EPA National and Regional offices, numerous states, the environmental community, academia, industry and municipalities." EPA Reply Br. at 6-7. The court has acknowledged that this statement is true regarding the ten percent figure and has, accordingly, deferred to the EPA's approval of West Virginia's ten percent de minimis figure. None of the materials cited by the EPA, however, make any mention of a twenty percent cumulative de minimis figure.

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n31 The de minimis standard for individual discharges is important primarily to potential dischargers, for that level will dictate how much any given discharger can contribute to the cumulative cap. From the perspective of water quality, however, it does not matter whether the number of discharges is one or one hundred; the relevant question is how much water quality is lowered by any and all discharges into a water body.

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[*111]

While the EPA fails to provide any citations to record evidence in support of this figure, the Industrial Intervenors do supply some additional citations. First, the Industrial Intervenors point out that the Great Lakes Guidance allows cumulative discharges of certain chemicals to be considered de minimis so long as "at least ten percent of the total assimilative capacity remains unused following the lowering of water quality." Great Lakes SID at 207; AR 460. While the Industrial Intervenors do not provide further explanation, it appears that this standard would allow cumulative discharges to use up to ninety percent of assimilative capacity and still be considered de minimis. If a ninety percent reduction can be considered de minimis, then obviously a twenty percent reduction can also be considered de minimis. There are several responses to this point. First, this standard from the Great Lakes SID applies only to certain specified pollutants. Second, the standard uses the phrase "total assimilative capacity" rather than "available assimilative capacity," which is the phrase used by the EPA in setting the individual de minimis standard and the phrase used by[*112] West Virginia in section 5.6.d. It is unclear whether these phrases mean the same thing. Significantly, the EPA has not argued to this court that a cumulative reduction in up to ninety percent of the available assimilative capacity for any pollutant would be a permissible de minimis standard. Most importantly, if the Great Lakes SID cited by the Industrial Intervenors does stand for the proposition that multiple individual discharges, each reducing the available assimilative capacity by less than ten percent, could be considered de minimis on a cumulative basis so long as those discharges used up no more than ninety percent of the available assimilative capacity, the court would reject that standard out of hand. It is hard to imagine how § 131.12(a)(2)'s command that 'water quality shall be maintained and protected' would be satisfied by a provision that permitted a reduction in water quality of as much as ninety percent of a water body's available

assimilative capacity for any given pollutant. Accordingly, the court the Industrial Intervenors' attempt to find support for the twenty percent cumulative de minimis figure in the Great Lakes SID.

In addition to that document, [*113] the Industrial Intervenors reference Colorado's antidegradation procedures, which have been approved by the EPA. Ind. Br., Exh. 7. Colorado's procedures have a de minimis standard somewhat similar to that included by West Virginia. Under Colorado's procedures, discharges of certain pollutants, (bioaccumulative toxic pollutants) are considered de minimis if the "new or increased loading from the source under review is less than 10 percent of the existing total load to that portion of the segment impacted by the discharge ...; provided, that the cumulative impact of increased loading from all sources shall not exceed 10 percent of the baseline total load" Ind. Br., Exh. 7, at 20. The Industrial Intervenors do not explain whether this standard, phrased in terms of percent of existing total load, is equivalent to a reduction in available assimilative capacity. Assuming that it is equivalent, Colorado's procedures in this regard fall within the ten percent figure that the court has already found to be reasonable in light of the evidence. n32 For all remaining pollutants, the Colorado procedures provide that a new or increased discharge will be considered de minimis if that[*114] discharge "will consume, after mixing, less than 15 percent of the baseline available increment, provided that the cumulative increase in concentration from all sources shall not exceed 15 percent of the baseline available increment." Id. Accordingly, it appears that Colorado's procedures permit a ten percent reduction (either individually or cumulatively) for certain chemicals and a fifteen percent reduction (either individually or cumulatively) for all remaining chemicals. In addition, however, these discharges are considered de minimis only on the further condition that the activity "will result in only temporary or short term changes in water quality. This [de minimis] exception shall not apply where long-term operation of the regulated activity will result in an adverse change in water quality." Id.

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n32 If this standard is not equivalent to a ten percent reduction in available assimilative capacity, the Industrial Intervenors do not explain what the standard means or how it relates to West Virginia' standard in this case.

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[*115]

The court concludes that Colorado's procedures do not provide adequate support for West Virginia's twenty percent cumulative reduction figure. First of all, the fact that the EPA previously approved another State's plan is not evidence that the plan is consistent with minimum federal requirements - the EPA's approval of West Virginia's plan here is not in and of itself "evidence" that this court could rely on to conclude that West Virginia's plan meets minimum federal requirements. While the Industrial Intervenors point to Colorado's procedures, they do not point to any evidence (either within or outside the of record in this case) that Colorado or the EPA reasonably relied on in determining that fifteen percent was a permissible and reasonable figure. n33 Second, fifteen percent is, obviously, a lower figure than twenty percent. It remains the case that even if fifteen percent is an acceptable figure, no party has offered evidence as to why twenty percent is also an acceptable figure. Third, Colorado's procedures contains an important limitation, absent in West Virginia's procedures, that safeguards against the risk that supposedly de minimis discharges will degrade water[*116] quality over the long term.

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n33 The court does not suggest that such evidence was lacking in Colorado's case. The point is rather that this court has no idea whether Colorado's fifteen percent was justified, because no party has submitted or cited to the evidence on which Colorado and/or the EPA relied.

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In sum, because neither the EPA nor the Intervenors have cited to evidence supporting the EPA's approval of West Virginia's twenty percent de minimis figure, the court concludes that the EPA's approval of the twenty percent de minimis provision was arbitrary and capricious.

9. Tier 2.5

As explained above, [HN27] the EPA's regulations establish three tiers of antidegradation review, and those tiers serve as the federal minimum below which State antidegradation procedures cannot fall. Nothing in the EPA's regulations, however, prevents States from setting standards above the federal minimum. In its antidegradation implementation procedures, West Virginia, like a number of other States, created an additional[*117] tier of antidegradation protection, designated as Tier 2.5. Tier 2.5 provides greater protection than Tier 2 for certain high quality waters that the State deems deserving of heightened protection, but which do not qualify for Tier 3 protection. Because Tier 2.5 is not required by EPA regulations, the only restriction on West Virginia's Tier 2.5 standards is that they not fall below the minimum standards set for Tier 2.

(a) Ten Percent De Minimis Standard

The plaintiffs raise an objection to similar de minimis provisions included in section 60-5-6.3-a, which applies to waters classified as Tier 2.5. Except for the four pollutants discussed below in part IV.9.b, Tier 2.5 contains the same de minimis provision for individual discharges as Tier 2- ten percent of remaining assimilative capacity for each pollutant - but contains a stricter de minimis provision for cumulative discharges, which is also set at ten (rather than twenty) percent. The court has already concluded in part IV.8 that ten percent is an acceptable de minimis figure. For the reasons stated in part IV.8, then, the court concludes that the EPA's approval of these de minimis provisions for[*118] Tier 2.5 was reasonable.

(b) Four pollutants given numerical values

Apart from establishing the ten percent individual and ten percent cumulative standards for Tier 2.5 waters, section 60-5-6.3.a sets specified numerical criteria defining "significant degradation" for four categories of pollutant: dissolved oxygen, pH, fecal coliform, and temperature. Specifically, the regulations provide that discharges affecting these categories will be deemed insignificant so long as: (1) a dissolved oxygen discharge does not result in a dissolved oxygen sag greater than 0.4 ppm, section 6.3.a. 1; (2) pH is maintained between 6.0 and 9.0, section 6.3.a.2; (3) thermal discharges do not increase temperature more than two degrees Fahrenheit, section 6.3.a.3; and (4) fecal coliform concentrations average no more than 200/100 ml monthly and 400/100 ml daily, section 6.4, a.4. The plaintiffs object to these numerical criteria on the basis that there is no evidence in the record to suggest that discharges of dissolved oxygen, pH, thermal discharges, or fecal coliform that

fall within these boundaries will not significantly affect water quality.

In response, the EPA argues that these four categories[*119] of pollutants are not susceptible to analysis based on percentage reduction of assimilative capacity. The plaintiffs do not contest that this is true, but reiterate that there is no evidence in the record showing that these particular numerical criteria are truly insignificant. Apart from stating that the use of numerical criteria for these pollutants is superior to the use of assimilative capacity reduction, the EPA simply states that "because it is a reasonable interpretation of 40 C.F.R. § 131.12(a)(2) to include such a threshold, EPA's approval should be upheld." EPA Op. Br. at 21. n34 Remarkably, the EPA cites to nothing in the record in support of its proposition that these particular numerical criteria represent a level of degradation that is harmless or trivial. The EPA has provided this court with no explanation whatsoever as to the significance of numerical criteria such as a minimum 0.4 parts mg/l "sag" of dissolved oxygen or 200/100 ml monthly or 400/100 ml daily average concentrations of fecal coliform. The EPA cites to no discussion of the effects (or lack thereof) of these amounts of these pollutants on water quality, or to any scientific[*120] data from which the EPA could conclude that these pollutants within these ranges do not result in a "lowering" of water quality. The EPA simply rests on its right to define some minimum amount of degradation as trivial and therefore not "really" degradation, but does not even attempt to explain why the particular numerical criteria chosen here have any meaning. The court is fully aware that [HN28] "an agency's data selection and choice of statistical methods are entitled to great deference and its conclusions with respect to data and analysis need only fall within a 'zone of reasonableness'." *Reynolds Metals Co. v. EPA*, 760 F.2d 549, 559 (4th Cir. 1985) (citations omitted). "This standard, however, does not compel [the court] to abdicate [its] judicial function, and [the court is] mindful that the Agency must fully explicate its course of inquiry, its analysis, and its reasoning." *Id.* (quotation marks and citation omitted). In this case, the EPA has cited no data in support of these numerical criteria. Accordingly, the court concludes that the EPA's approval of West Virginia's numerical criteria in section 6.3.a was arbitrary and capricious.

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n34 The EPA adds nothing further in its reply brief, but simply states that "EPA explained in EPA's Op. Br. the scientific basis for establishing thresholds for

these pollutants through numeric criteria rather than based on a percent of assimilative capacity." EPA Reply Br. at 8.

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10. Trading provisions

The plaintiffs' final challenge to the EPA's approval of West Virginia's antidegradation implementation procedures concerns certain water quality trading provisions. The trading provisions state that a proposed new or expanded discharge will be allowed, without triggering antidegradation review, "where the applicant agrees to implement or finance upstream controls of point or nonpoint sources sufficient to offset the water quality effects of the proposed activity from the same parameters and insure an improvement in water quality as a result of the trade ... A trade may be made between more than one stream segment where removing a discharge in one stream segment directly results in improved water quality in another stream segment." Section 5.6.f. These trading provisions are present in the regulations governing all four Tiers of protection (Tiers 1, 2, 2.5, and 3). See section 60-5-4.8, 5-5.6.f, 5-6.3.h, 5-7.5. n35

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n35 Section 4.8, the trading provision governing Tier 1 waters, is worded slightly differently than the other three sections. As it relates to the plaintiffs' objections, however, section 4.8 is the same as the other sections.

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The plaintiffs raise several objections to these trading provisions. First, the plaintiffs argue that the trading provisions permit a new or expanded source to discharge into a water segment that does not meet water quality

standards. This violates EPA regulations regarding NPDES permits, the plaintiffs argue, which prohibit further discharges into non-compliant water quality segments unless certain strict controls are in place. See *40 C.F.R. §§ 122.4(i), 122.44(d)*. In response, the EPA agrees with the plaintiffs' statement regarding its NPDES regulations, but disagrees that the antidegradation trading provisions authorize West Virginia to permit discharges that would otherwise violate NPDES standards. The court agrees that the antidegradation trading provisions merely permit a new or expanded discharge to satisfy antidegradation requirements in certain circumstances; those provisions do not purport to exempt (and do not exempt) those discharges from limits imposed by other regulations, such as NPDES permit regulations.

Second, the plaintiffs argue that the trading provisions are illegal because they permit an applicant to offset new or expanded point[*123] source discharge with a reduction in nonpoint source discharge. Because West Virginia has neither developed nor implemented a system for quantifying nonpoint source pollution, the plaintiffs argue, it cannot permit an applicant to trade some unquantified reduction in nonpoint source pollution for a quantified increase in point source pollution. To put it another way, the plaintiffs argue that it will be impossible for West Virginia to ensure that a reduction in nonpoint source pollution truly offsets an increase in point source pollution, because West Virginia has no method of quantifying nonpoint source pollution. In response, the EPA argues that this objection is premature, as it pertains to the implementation of the trading provisions rather than the provisions themselves. The EPA notes that its approval of this program "does not mean that West Virginia will attempt to use these provisions without first developing a quantification method to ensure that trades with nonpoint sources meet the conditions specified in the trading provisions ... EPA understands that West Virginia is developing that method now and EPA expects that West Virginia will not use these trading provisions until[*124] that method has been developed." EPA Op. Br. at 46 n.50.

The court agrees with the EPA that the plaintiffs' objection in this regard pertains to the implementation of these provisions, not to the validity of the provisions themselves. The trading provisions require, among other things, that the reduced upstream pollution be "sufficient to offset the water quality effects of the proposed activity," that "where uncertainty exists regarding the effluent trade, an adequate margin of safety will be required," and that "the trades must be enforceable." Section 5.6.f. If West Virginia were to permit trading between point sources and nonpoint sources without any means of quantifying the reduction in nonpoint source pollution, it would clearly be violating these parts of its

own regulation. Thus, the EPA is entirely reasonable in interpreting West Virginia's trading provisions as requiring that nonpoint source pollution reduction be quantifiable before any trading with nonpoint sources will be permitted. This objection is therefore without merit.

Finally, the plaintiffs argue that the trading provisions for Tiers 2, 2.5 and 3 are inconsistent with EPA regulations because they permit trading [*125]between two different stream segments without requiring an improvement in the same stream segment where the new or expanded discharge occurs. That is, the plaintiffs argue that under the trading provisions, an individual would be permitted to lower the water quality in one stream segment without antidegradation review so long as that individual improves another, different stream segment. The EPA agrees with the plaintiffs that its regulations do not permit the degradation of one stream segment without antidegradation review simply because another, different stream segment is improved. The EPA states that trading without antidegradation review is only permissible when the stream segment where the new or expanded discharge occurs experiences a net improvement in water quality. The EPA argues, however, that the West Virginia trading provisions are consistent with this approach.

The trading provisions state that trading is permissible when "upstream controls of point or nonpoint sources [are] sufficient to offset the water quality effects of the proposed activity from the same parameters and insure an improvement in water quality as a result of the trade." Section 5.6.f. In addition, [*126] the provision states that "[a] trade may be made between more than one stream segment where removing a discharge in one stream segment directly results in improved water quality in another stream segment." Section 5.6.f. The court concludes that these statements, taken together, are ambiguous as to whether the improvement must occur in the same stream segment where the discharge takes place, or whether an improvement in one stream segment may be traded for a decrease in quality in another stream segment. The EPA's conclusion that the trading provisions mean the former is a reasonable interpretation of those provisions, and thus the court will defer to that interpretation. The part of section 5.6.f that refers to improvement in quality in "another stream segment" seems to suggest that one segment may be degraded if another segment is improved. This statement must be read in light of the first part of section 5.6.f, however, which provides that the reduction must be "sufficient to offset the water quality effects of the proposed activity," and that the trade must "insure an improvement in water quality." These provisions can reasonably be read to mean that the trade must[*127] result in an improvement

in water quality in the water segment where the new or expanded discharge is located. Because this interpretation of the trading provisions is reasonable, the EPA's approval of these provisions was not arbitrary or capricious.

V. Conclusion

All in all the plaintiffs have raised challenges to the EPA's approval of what the court has construed as thirteen different parts of West Virginia's antidegradation procedures. n36 The court has concluded that the EPA's approval of West Virginia's plan was reasonable as to six of these issues but arbitrary and capricious as to the remaining seven issues. To summarize, the court has concluded that:

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n36 The plaintiffs identify ten main issues, three of which consist of two sub-issues, for a total of thirteen.

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1. The EPA's approval of section 4.3, which classifies large segments of the Kanawha and Monongahela Rivers as Tier 1 waters, was not based on adequate evidence in the record regarding the quality of waters in those rivers. Accordingly, [*128] this approval was arbitrary and capricious.

2. The EPA's approval of section 5.6.a.2, which generally requires Tier 2 review only to new or expanded discharges, but also provides for Tier 2 review when an existing permitted discharge results in ongoing degradation, was reasonable.

3. The EPA's approval of section 5.6.c, which allows a discharge from a publicly owned wastewater treatment facility so long as there is a "net decrease in the overall pollutant loading," was arbitrary and capricious.

4. The EPA's approval of section 3.7, which requires Tier 2 antidegradation review for discharges under a general *section 402* or *section 404* permit only at the time the general permit is issued, and not for individual

discharges under such permits, was arbitrary and capricious.

5. The EPA's approval of section 1.5.b, which states that nonpoint sources will be deemed in compliance if best management practices are installed and maintained, was reasonable.

6. The EPA's approval of section 5.6.c, which affords the State the power to exempt classes or categories of activities from Tier 2 review but does not reflect the State's existing powers under *section 303(c) of the CWA*, was arbitrary and[*129] capricious.

7. (a) The EPA's approval of section 5.2, which provides that "water segments that support the minimum fishable/swimmable uses and have assimilative capacity remaining for some parameters" shall only "generally" be provided Tier 2 protection, was arbitrary and capricious.

(b) The EPA's approval of section 5.3, which gives the WVDEP Secretary the discretion in certain circumstances to determine whether such waters are overall of a high quality, was reasonable.

8. (a) The EPA's approval of section 5.6.a.1, insofar as that provision allows for a ten percent reduction in the available assimilative capacity of individual pollutant parameters from an individual discharge before Tier 2 review is required, was supported by evidence in the record and therefore was reasonable.

(b) The EPA's approval of section 5.6.a.1, insofar as that provision allows for a twenty percent cumulative reduction from all discharges before Tier 2 review is required, was not supported by any evidence in the record and therefore was arbitrary and capricious.

9. (a) The EPA's approval of section 6.3.a, which allows for a ten percent reduction, whether individually or cumulatively, in available assimilative [*130]capacity before Tier 2.5 review is required, was reasonable.

(b) The EPA's approval of section 6.3.a.1-4, which set numerical criteria for four individual pollutant

parameters, was not supported by any evidence in the record and was therefore arbitrary and capricious.

10. The EPA's approval of the trading provisions, sections 4.8, 5.6.f, 6.3.h, and 7.5, which can reasonably be read to require that the trade must result in an improvement to water quality in the water segment where the new or expanded discharge is located, was reasonable.

For the reasons stated above, the court GRANTS the plaintiffs' motion for summary judgment and DENIES the motions for summary judgment filed by the EPA and the defendant-intervenors. The court VACATES the EPA's approval of West Virginia's antidegradation procedures and REMANDS to the EPA for further proceedings consistent with this opinion. n37

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n37 The plaintiffs make no mention in their motion for summary judgment of their request in the complaint for costs and attorneys' fees. If the plaintiffs still seek an award of costs and fees, they should pursue such an award by separate motion.

-----End Footnotes-----

[*131]

The court DIRECTS the Clerk to send a copy of this Order to counsel of record and any unrepresented party, and DIRECTS the Clerk to post this published opinion at <http://www.wvsc.uscourts.gov>.

ENTER: August 29, 2003

JOSEPH R. GOODWIN

UNITED STATES DISTRICT JUDGE

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ENVIRONMENTAL DEFENSE CENTER, INC., Petitioner, NATURAL RESOURCES DEFENSE COUNCIL, INC., Petitioner-Intervenor, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent. AMERICAN FOREST & PAPER ASSOCIATION; NATIONAL ASSOCIATION OF HOME BUILDERS, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent, NATURAL RESOURCES DEFENSE COUNCIL, INC., Applicant-Intervenor. TEXAS CITIES COALITION ON STORMWATER; TEXAS COUNTIES STORM WATER COALITION, Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent, NATURAL RESOURCES DEFENSE COUNCIL, INC., Respondent-Intervenor.
No. 00-70014, No. 00-70734, No. 00-70822

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2003 U.S. App. LEXIS 19073

December 3, 2001, Argued and Submitted, Pasadena, California
September 15, 2003, Filed

PRIOR HISTORY: [*1] Petition for Review of an Order of the Environmental Protection Agency. EPA No. Clean Water 40 CFR, EPA No. Clean Water 40 CFR, EPA No. Clean Water 40 CFR. *Envtl. Def. Ctr., Inc. v. EPA*, 319 F.3d 398, 2003 U.S. App. LEXIS 497 (9th Cir., 2003)

DISPOSITION: Affirmed in part, denied in part and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioners, environmental organizations, industrial organizations, and municipal organizations, challenged an administrative rule issued by the Environmental Protection Agency (EPA) pursuant to the Clean Water Act, 33 U.S.C.S. §§ 1251-1387, to control pollutants introduced into the nation's waters by storm sewers. Petitioners challenged the rule on 22 constitutional, statutory, and procedural grounds.

OVERVIEW: Petitioners challenged an administrative rule issued by the EPA pursuant to the Clean Water Act to control pollutants introduced into the nation's waters by storm sewers. The court determined that the rule did not violate the Tenth Amendment because it directed no unconstitutional coercion. The purpose of the challenged rule was legitimate and consistent with the regulatory goals of the overall scheme of the Clean Water Act. The rule did not offend the First Amendment. However, the court determined that the EPA's failure to require review of Notices of Intent (NOIs), which were the functional equivalents of permits under the rule's general permit

option, and the EPA's failure to make NOIs available to the public or subject to public hearings, contravened the express requirements of the Clean Water Act. Hence, it was necessary to remand the action so that the EPA could take appropriate action to comply with the Clean Water Act. It was also necessary to remand the action so that the EPA could consider in an appropriate proceeding petitioners' contention that the rule required the EPA to regulate forest roads.

OUTCOME: The court remanded three aspects of the rule concerning the issuance of NOIs under the rule's general permitting scheme, and a fourth aspect concerning the regulation of forest roads. The court affirmed the rule against all other challenges.

CORE TERMS: phase, regulation, stormwater, site, water quality, designation, regulated, pollutant, water, designate, forest, maximum, discharger, notice, practicable, entity, consultation, runoff, industrial, pollution, arbitrary and capricious, nationwide, message, acre, case-by-case, municipal, proposed rule, rulemaking, residual, regional

LexisNexis (TM) HEADNOTES - Core Concepts:

Governments: Legislation: Interpretation
[HN1] A statute should not be interpreted to render any provision superfluous.

Constitutional Law: Congressional Duties & Powers: Reserved Powers
Environmental Law: Water Quality

[HN2] The Phase II Rule under § 402(p) of the Clean Water Act does not violate the Tenth Amendment because it directs no unconstitutional coercion.

Constitutional Law: Congressional Duties & Powers: Reserved Powers

[HN3] Under the Tenth Amendment, the federal government may not compel states to implement, by legislation or executive action, federal regulatory programs. Similarly, the federal government may not force the states to regulate third parties in furtherance of a federal program. These protections extend to municipalities. However, while the federal government may not compel them to do so, it may encourage states and municipalities to implement federal regulatory programs. The crucial proscribed element is coercion; the residents of the state or municipality must retain "the ultimate decision" as to whether or not the state or municipality will comply with the federal regulatory program. However, as long as the alternative to implementing a federal regulatory program does not offend the federal constitution's guarantees of federalism, the fact that the alternative is difficult, expensive, or otherwise unappealing is insufficient to establish a Tenth Amendment violation.

Environmental Law: Water Quality

[HN4] The purpose of the Phase II Rule provisions is legitimate and consistent with the regulatory goals of the overall scheme of the Clean Water Act and does not offend the First Amendment.

Constitutional Law: The Judiciary: Case or Controversy: Constitutionality of Legislation

Governments: Legislation: Interpretation

[HN5] A regulation is facially unconstitutional only when every possible reading compels it.

Constitutional Law: The Judiciary: Case or Controversy: Constitutionality of Legislation

Governments: Legislation: Interpretation

[HN6] When the constitutional validity of a statute or regulation is called into question, it is a cardinal rule that courts must first determine whether a construction is possible by which the constitutional problem may be avoided.

Administrative Law: Agency Rulemaking: Informal Rulemaking

[HN7] The Administrative Procedure Act requires an agency to publish notice of a proposed rulemaking that includes either the terms or substance of the proposed rule or a description of the subjects and issues involved. *5 U.S.C.S. § 553(b)(3)*.

Administrative Law: Agency Rulemaking: Informal Rulemaking

Administrative Law: Judicial Review: Standards of Review: Standards Generally

[HN8] A final regulation that varies from the proposal, even substantially, will be valid as long as it is in character with the original proposal and a logical outgrowth of the notice and comments. In determining whether notice was adequate, a court considers whether the complaining party should have anticipated that a particular requirement might be imposed. The test is whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule.

Administrative Law: Judicial Review: Standards of Review: Arbitrary & Capricious Review

[HN9] In reviewing a federal administrative agency's interpretation of a statute it administers, a court first determines whether Congress has expressed its intent unambiguously on the question before the court. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, instead, Congress has left a gap for the administrative agency to fill, the court proceeds to step two. At step two, the court must uphold the administrative regulation unless it is arbitrary, capricious, or manifestly contrary to the statute.

Environmental Law: Water Quality

[HN10] The Phase II General Permit option violates the Clean Water Act's requirement that permits for discharges require controls to reduce the discharge of pollutants to the maximum extent practicable. *33 U.S.C.S. § 1342(p)(3)(B)(iii)*.

Environmental Law: Water Quality

[HN11] The Phase II General Permit option violates the Clean Water Act because it does not contain express requirements for public participation in the National Pollutant Discharge Elimination System (NPDES) permitting process.

Environmental Law: Water Quality

[HN12] Primary responsibility for enforcement of the requirements of the Clean Water Act is vested in the Administrator of the Environmental Protection Agency (EPA). *33 U.S.C.S. § 1251(d)*; *33 U.S.C.S. § 1361(a)*. The Clean Water Act renders illegal any discharge of pollutants not specifically authorized by a permit. *33 U.S.C.S. § 1311(a)*. Under the Phase II Rule, dischargers may apply for an individualized permit with the relevant permitting authority, or may file a "Notice of Intent"

(NOI) to seek coverage under a "general permit." 40 C.F.R. § 122.33(b).

Environmental Law: Assessment & Information Access: Public Access to Information

Environmental Law: Water Quality

[HN13] The Clean Water Act requires that a copy of each permit application and each permit issued under the National Pollutant Discharge Elimination System (NPDES) permitting program shall be available to the public, 33 U.S.C.S. § 1342(j), and that the public shall have an opportunity for a hearing before an permit application is approved, 33 U.S.C.S. § 1342(a)(1).

Administrative Law: Judicial Review: Standards of Review: Arbitrary & Capricious Review

[HN14] Agency determinations based on the record are reviewed under the "arbitrary and capricious" standard. 5 U.S.C.S. § 706(2)(A). The standard is narrow and a reviewing court may not substitute its judgment for that of the agency. However, the agency must articulate a rational connection between the facts found and the conclusions made. The reviewing court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. The court may reverse under the "arbitrary and capricious" standard only if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Constitutional Law: The Judiciary: Case or Controversy: Standing

[HN15] A claimant meeting Article III standing requirements must show that (1) it has suffered an "injury in fact;" (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Standing requires an injury that is actual or imminent, not conjectural or hypothetical.

Administrative Law: Judicial Review: Standing

[HN16] The failure of an administrative agency to comply with procedural requirements in itself establishes sufficient injury to confer standing, even though the administrative result might have been the same had proper procedure been followed.

Civil Procedure: Justiciability: Standing

[HN17] A plaintiff who shows that a causal relation is "probable" has standing, even if the chain cannot be definitively established. Standing may be established by

harm resulting indirectly from challenged acts. Causation may be established if a plaintiff shows a good probability, absent the challenged action, that the alleged harm would not have occurred.

Administrative Law: Judicial Review: Standards of Review: Arbitrary & Capricious Review

[HN18] A court will reverse an agency decision under the arbitrary and capricious standard only if the agency has relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision contrary to the evidence before the agency, or if the decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Administrative Law: Judicial Review: Standards of Review: Substantial Evidence Review

[HN19] A court applies the substantial evidence standard when reviewing the factual findings of an agency. The substantial evidence standard requires a showing of such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Administrative Law: Judicial Review: Standards of Review: Arbitrary & Capricious Review

[HN20] A regulation creating exemptions by waiver is reviewed under the arbitrary and capricious standard.

Governments: Legislation: Interpretation

[HN21] Whether a statute delegates legislative power is a question for the courts, and an agency's interpretation has no bearing upon the answer.

Administrative Law: Agency Rulemaking: Rule Application & Interpretation

[HN22] According to the "logical outgrowth" standard, a final regulation must be in character with the original proposal and a logical outgrowth of the notice and comments.

Administrative Law: Agency Rulemaking: Informal Rulemaking

[HN23] The Regulatory Flexibility Act (RFA), 5 U.S.C.S. §§ 601-611, requires a federal agency to prepare a regulatory flexibility analysis and an assessment of the economic impact of a proposed rule on small business entities, 5 U.S.C.S. § 604, unless the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities and provides a factual basis for that certification. 5 U.S.C.S. § 605.

Administrative Law: Agency Rulemaking: Informal Rulemaking

[HN24] The plain language of 5 U.S.C.S. § 605(b) sets out a three-component test indicating that an agency need not perform a regulatory flexibility analysis if it finds that a proposed rule will not have: (1) a significant economic impact on (2) a substantial number of (3) small entities. 5 U.S.C.S. § 605(b).

Administrative Law: Agency Rulemaking: Informal Rulemaking

[HN25] In granting relief under the Regulatory Flexibility Act (RFA), 5 U.S.C.S. § 611, a court may order an agency to take corrective action consistent with the RFA and the Administrative Procedure Act (APA), including remand to the agency. 5 U.S.C.S. § 611(a)(4)(A).

COUNSEL: Victoria Clark, Environmental Defense Center, Santa Barbara, California, for petitioner Environmental Defense Center, Inc.

Andrew G. Frank and Arlene Yang, Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York, and Nancy K. Stoner, Natural Resources Defense Council, Washington, D.C., for intervenor National Resources Defense Council, Inc.

R. Timothy McCrum, Ellen B. Steen, and Donald J. Kochan, Crowell & Moring, Washington, D.C., for petitioners American Forest & Paper Association and National Association of Home Builders.

Steven P. Quarles and J. Michael Klise, Crowell & Moring, Washington, D.C., and William R. Murray, American Forest & Paper Association, Washington, D.C., for petitioner American Forest & Paper Association.

Jim Mathews and Clarence Joe Freeland, Mathews & Free-land, Austin, Texas, for petitioner Texas Cities Coalition on Stormwater.

Sydney W. Falk, Jr. and William D. Dugat III, Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, Austin, Texas, for petitioner Texas Counties[*2] Storm Water Coalition.

John C. Cruden, Daniel M. Flores and Kent E. Hanson, United States Department of Justice, Washington, D.C., and Stephen J. Sweeny, United States Environmental Protection Agency, Washington, D.C., for respondent United States Environmental Protection Agency.

JUDGES: Before: James R. Browning, Stephen Reinhardt, and Richard C. Tallman, Circuit Judges. Opinion by Judge Browning; Partial Concurrence and Partial Dissent by Judge Tallman.

OPINIONBY: James R. Browning

OPINION:

BROWNING, Circuit Judge:

Petitioners challenge a rule issued by the United States Environmental Protection Agency pursuant to the Clean Water Act, 33 U.S.C. §§ 1251-1387, to control pollutants introduced into the nation's waters by storm sewers.

Storm sewers drain rainwater and melted snow from developed areas into water bodies that can handle the excess flow. Draining stormwater picks up a variety of contaminants as it filters through soil and over pavement on its way to sewers. Sewers are also used on occasion as an easy (if illicit) means for the direct discharge of unwanted contaminants. Since storm sewer systems generally channel collected runoff into federally protected[*3] water bodies, they are subject to the controls of the *Clean Water Act*.

In October of 1999, after thirteen years in process, the Environmental Protection Agency ("EPA") promulgated a final administrative rule (the "Phase II Rule" n1 or "the Rule") under § 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p), mandating that discharges from small municipal separate storm sewer systems and from construction sites between one and five acres in size be subject to the permitting requirements of the National Pollutant Discharge Elimination System ("NPDES"), 33 U.S.C. §§ 1311(a), 1342. EPA preserved authority to regulate other harmful stormwater discharges in the future.

-----Footnotes-----

n1 The "Phase II Rule" reviewed here is the product of the second stage of EPA's two-phase stormwater rulemaking effort. The "Phase I Rule," governing larger-scale stormwater discharges, was issued in 1990 and reviewed by this court in *NRDC v. EPA*, 966 F.2d 1292 (9th Cir. 1992).

-----End Footnotes-----

[*4]

In the three cases consolidated here, petitioners and intervenors challenge the Phase II Rule on twenty-two

constitutional, statutory, and procedural grounds. We remand three aspects of the Rule concerning the issuance of notices of intent under the Rule's general permitting scheme, and a fourth aspect concerning the regulation of forest roads. We affirm the Rule against all other challenges.

I.

BACKGROUND

A. The Problem of Stormwater Runoff

Stormwater runoff is one of the most significant sources of water pollution in the nation, at times "comparable to, if not greater than, contamination from industrial and sewage sources." n2 Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. n3 In 1985, three-quarters of the States cited urban stormwater runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. n4 Urban runoff has been named as the foremost cause of impairment of surveyed ocean[*5] waters. n5 Among the sources of stormwater contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems. n6

-----Footnotes-----

n2 Richard G. Cohn-Lee and Diane M. Cameron, Urban Stormwater Run-off Contamination of the Chesapeake Bay: Sources and Mitigation, *THE ENVIRONMENTAL PROFESSIONAL*, Vol. 14, p. 10, at 10 (1992); see also *NRDC*, 966 *F.2d* at 1295 (citing a study by the Nationwide Urban Runoff Program).

n3 Regulation for Revision of the Water Pollution Control Program Addressing Storm Water, 64 *Fed. Reg.* 68,722, 68,724, 68,727 (Dec. 8, 1999) (codified at 40 *C.F.R.* pts. 9, 122, 123, and 124).

n4 *Id.* at 68,726.

N5 *Id.*

n6 *Id.* at 68,725-31.

-----End Footnotes-----

B. Stormwater and the Clean Water Act

Congress enacted the *Clean Water Act in 1948* to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 *U.S.C.* § 1251(a)[*6] (originally codified as the *Federal Water Pollution Control Act*, 62 Stat. 1155). The *Clean Water Act* prohibits the discharge of pollutants from a "point source" n7 into the waters of the United States without a permit issued under the terms of the National Pollutant Discharge Elimination System, 33 *U.S.C.* §§ 1311(a), 1342, which requires dischargers to comply with technology-based pollution limitations (generally according to the "best available technology economically achievable," or "BAT" standard). 33 *U.S.C.* § 1311(b)(2)(A). NPDES permits are issued by EPA or by States that have been authorized by EPA to act as NPDES permitting authorities. 33 *U.S.C.* § 1342(a)-(b). The permitting authority must make copies of all NPDES permits and permit applications available to the public, 33 *U.S.C.* §§ 1342(j), 1342(b)(3); state permitting authorities must provide EPA notice of each permit application, 33 *U.S.C.* § 1342(b)(4); and a permitting authority must provide an opportunity for a public hearing before issuing any permit, 33 *U.S.C.* §§ 1342(a)(1), [*7]1342(b)(3); cf. 33 *U.S.C.* § 1251(e) (requiring public participation).

-----Footnotes-----

n7 A point source is "any discernible, confined and discrete conveyance, including but not limited to any

pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

id. at 1306, and that EPA did not act capriciously in defining "municipal," *id. at 1304*, or in placing differently-sized municipalities on different permitting schedules, *id. at 1301*.

-----End Footnotes-----

-----End Footnotes-----

Storm sewers are established point sources subject to NPDES permitting requirements. *NRDC v. Costle*, 186 U.S. App. D.C. 147, 568 F.2d 1369, 1379 (D.C. Cir. 1977) (holding unlawful EPA's exemption of stormwater discharges from NPDES permitting requirements); *NRDC v. EPA*, 966 F.2d 1292, 1295 (9th Cir. 1992). n8 In 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted Clean Water Act § 402(p), 33 U.S.C. § 1342(p), "Municipal and[*8] Industrial Stormwater Discharges." Sections 402(p)(2) and 402(p)(3) mandate NPDES permits for storm-water discharges "associated with industrial activity," discharges from large and medium-sized municipal storm sewer systems, and certain other discharges. Section 402(p)(4) sets out a timetable for promulgation of the first of a two-phase overall program of stormwater regulation. *Id. at* § 1342(p)(2)-(4); *NRDC*, 966 F.2d at 1296. In 1990, pursuant to § 402(p)(4), EPA issued the Phase I Rule regulating large discharge sources. n9

[*9]

C. The Phase II Stormwater Rule

In *Clean Water Act* § 402(p), Congress also directed a second stage of stormwater regulation by ordering EPA to identify and address sources of pollution not covered by the Phase I Rule. Section 402(p)(1) placed a temporary moratorium (expiring in 1994) on the permitting of other stormwater discharges pending the results of studies mandated in § 402(p)(5) to identify the sources and pollutant content of such discharges and to establish procedures and methods to control them as "necessary to mitigate impacts on water quality." 33 U.S.C. § 1342(p)(5). Section 402(p)(6) required that EPA establish "a comprehensive program to regulate" these storm-water discharges "to protect water quality," following the studies mandated in § 402(p)(5) and consultation with state and local officials. *Id. at* § 1342(p)(6).

-----Footnotes-----

EPA proposed the Phase II Rule in January of 1998. n10 In October, 1999, Congress passed legislation precluding EPA from promulgating the new Rule until EPA submitted an additional report to Congress supporting certain anticipated aspects of the Rule. n11 EPA was also required to publish its report in the Federal[*10] Register for public comment. Pub. L. No. 106-74, § 431(c), 113 Stat. at 1097. Later that month, EPA submitted the required ("Appropriations Act") study and promulgated the Rule. n12

N8 Diffuse runoff, such as rainwater that is not channeled through a point source, is considered nonpoint source pollution and is not subject to federal regulation. *Or. Nat'l Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1095 (9th Cir. 1998).

-----Footnotes-----

n9 National Pollutant Discharge Elimination System Permit Application Regulations for Stormwater Discharges, 55 Fed. Reg. 47,990 (Nov. 16, 1990) (codified at 40 C.F.R. pt. 122-124). The Phase I rule was challenged in this court in *NRDC*, 966 F.2d at 1292. We held, *inter alia*, that EPA must impose deadlines for permit approvals, *id. at 1300*, that EPA's decision to regulate construction sites only over five acres in size was arbitrary and capricious,

n10 Proposed Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 63 Fed. Reg. 1536 (proposed Jan. 9, 1998).

n11 Pub. L. No. 106-74, § 431(a), 113 Stat. 1047, 1096 (1999) ("Appropriations, 2000 -- Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies").

n12 Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722 (Dec. 8, 1999) (codified at 40 C.F.R. pts. 9, 122, 123, and 124).

-----End Footnotes-----

Under the Phase II Rule, NPDES permits are required for discharges from small municipal separate storm sewer systems ("small MS4s") and stormwater discharges from construction activity disturbing between one and five acres ("small construction sites"). 40 C.F.R. §§ 122.26(a)(9)(i)(A)-(B). [*11] Small MS4s may seek permission to discharge by submitting an individualized set of best-management plans in six specified categories, id. at § 122.34, either in the form of an individual permit application, or in the form of a notice of intent to comply with a general permit. Id. at § 122.33(b). Small MS4s may also seek permission to discharge through an alternative process, under which a permit may be sought without requiring the operator to regulate third parties, id. at §§ 122.33(b)(2)(ii), 122.26(d). n13 Small construction sites may apply for individual NPDES permits or seek coverage under a promulgated general permit. Id. at § 122.26(c). EPA also preserved authority to regulate other categories of harmful stormwater discharges on a regional, as-needed basis. Id. at § 122.26(a)(9)(i)(C)-(D).

-----Footnotes-----

n13 The Rule also allows a small MS4 to be regulated under an individual NPDES permit covering a nearby large or medium MS4, with provisions adapted to address the small MS4. 40 C.F.R. § 122.33(b)(3).

-----End Footnotes-----

[*12]

D. Facial Challenges to the Phase II Rule

The Rule was challenged in the Fifth, Ninth, and D.C. Circuits in three separate actions ultimately consolidated before the Ninth Circuit.

The Texas Cities Coalition on Stormwater and the Texas Counties Stormwater Coalition (collectively, "the Municipal Petitioners") assert that EPA lacked authority to require permitting, that its promulgation of the Rule was procedurally defective, that the Rule establishes categories that are arbitrary and capricious, and that the Rule impermissibly requires municipalities to regulate their own citizens in contravention of the *Tenth Amendment* and to communicate a federally mandated message in contravention of the *First Amendment*. The Natural Resources Defense Council ("NRDC") intervened on behalf of EPA.

Environmental Defense Center, joined by petitioner-intervenor NRDC ("the Environmental Petitioners"), asserts that the regulations fail to meet minimum *Clean Water Act* statutory requirements because they constitute a program of impermissible self-regulation, fail to provide required avenues of public participation, and neglect to address stormwater run-off associated with forest roads and other[*13] significant sources of runoff pollution.

The American Forest & Paper Association ("AF&PA") and the National Association of Home Builders ("the Industrial Petitioners") assert that promulgation of the Rule was procedurally defective and violated the *Regulatory Flexibility Act*, that EPA's retention of authority to regulate future sources of runoff pollution is ultra vires, and that the decision to regulate discharge from construction sites one to five acres in size is arbitrary and capricious. NRDC again intervened on behalf of EPA.

We have jurisdiction pursuant to section 509(b)(1) of the Clean Water Act, 33 U.S.C. § 1369(b)(1) (assigning review of EPA effluent and permitting regulations to the Federal Courts of Appeals).

II.

DISCUSSION

A. The Permit Requirements

The Municipal Petitioners' primary contention is that the Phase II Rule compels small MS4s to regulate citizens as a condition of receiving a permit to operate, and that EPA lacks both statutory and constitutional authority to impose such a requirement. Because we avoid considering constitutionality if an issue may be resolved on narrower grounds, *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 184, 144 L. Ed. 2d 161, 119 S. Ct. 1923 (1999),[*14] we first ask whether the Phase II Rule is supported by statutory authority.

1. Statutory Authority

The Municipal Petitioners assert that the statutory command in *Clean Water Act* § 402(p)(6) that EPA develop a "comprehensive program to regulate" small MS4s did not authorize a program based on NPDES permits. Petitioners argue that because § 402(p)(6) explicitly indicates elements that the program may contain (performance standards, guidelines, etc.) without mentioning "permits," Congress must have intended that the program exclude permitting. n14

-----Footnotes-----

n14 The text of that section reads: "Not later than October 1, 1993, [EPA], in consultation with state and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate." 33 U.S.C. § 1342(p)(6).

-----End Footnotes-----

[*15]

The fact that "permitting" is not included on a statutory list of elements that the program "may" include is not determinative, because the list is manifestly nonexclusive. The only constraints are that the § 402(p)(6) regulations be based on the § 402(p)(5) studies, that they be issued in consultation with state and local officials, and that -- "at a minimum" -- they establish priorities, requirements for state stormwater management programs, and expeditious deadlines, and constitute a comprehensive program "to protect water quality." 33 U.S.C. § 1342(p)(6). EPA was free to adopt any regulatory program, including a permitting program, that included these elements. See *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984) (deference to an agency's reasonable interpretation is required unless Congress expressed its intent unambiguously). It is more reasonable to interpret congressional silence about permits as an indication of EPA's flexibility not to use them than as an outright prohibition. n15

-----Footnotes-----

n15 The lesser category of "permits" may also be implied by the inclusion of "performance standards" in the list of possible program features.

-----End Footnotes-----

[*16]

The Municipal Petitioners further contend that their interpretation is supported by the structure of § 402(p), which expressly requires permits for large and medium sized MS4s in a separate section, § 402(p)(3)(B). n16 However, as EPA counters, the language in § 402(p)(3) requiring permits for municipal storm sewers may be interpreted to apply both to Phase I and Phase II MS4s. Moreover, as respondent-intervenor NRDC notes, the mere existence of the § 402(p)(1) permitting moratorium, designed to apply only to Phase II dischargers, necessarily implies that EPA has the authority to require permits from these sources after the 1994 expiration of the moratorium.

-----Footnotes-----

n16 "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States*, 522 U.S. 23, 29-30, 139 L. Ed. 2d 215, 118 S. Ct. 285 (1997).

n17 The Phase II Rule also allows a small MS4 to be regulated under an NPDES permit covering a nearby large or medium-sized MS4, with provisions adapted to address the small MS4. 40 C.F.R. § 122.33(b)(3).

-----End Footnotes-----

-----End Footnotes-----

Since[*17] there would have been no need to establish a permitting moratorium for these sources if the sources could never be subject to permitting requirements, petitioners' interpretation violates the bedrock principle that [HN1] statutes not be interpreted to render any provision superfluous. See *Burrey v. PG&E*, 159 F.3d 388, 394 (9th Cir. 1998). EPA's interpretation of its mandate under § 402(p)(6) was reasonable and EPA acted within its statutory authority in formulating the Phase II Rule as a permitting program.

2. The Tenth Amendment

The Municipal Petitioners contend that the Phase II Rule on its face compels operators of small MS4s to regulate third parties in contravention of the *Tenth Amendment*. We conclude that [HN2] the Rule does not violate the *Tenth Amendment*, because it directs no unconstitutional coercion.

The Phase II Rule contemplates several avenues through which a small MS4 may obtain permission to discharge. First, if the NPDES Permitting Authority overseeing the small MS4 has issued an applicable general permit, the small MS4 may submit a notice of intent wherein the small MS4 agrees to comply with the terms of the general permit[*18] and specifies plans for implementing six "Minimum Measures" designed to protect water quality. 40 C.F.R. §§ 122.33(b)(1), 122.34(d)(1)(i), 122.34(b). Second, the small MS4 may apply for an individual permit under 40 C.F.R. § 122.34, which would again require compliance with the six Minimum Measures. Id. at §§ 122.33(b)(2)(i), 122.34(a), 122.34(b). Third, under an "Alternative Permit" option, the small MS4 may apply for an individualized permit under 40 C.F.R. § 122.26(d), the permitting program established by the Phase I Rule for large and medium-sized MS4s. Id. at §§ 122.33(b)(2)(ii), 122.26(d). n17

-----Footnotes-----

The Minimum Measures mentioned above require small MS4s to implement programs for: (1) conducting[*19] public education and outreach on stormwater impacts, id. at § 122.34(b)(1); (2) engaging public participation in the development of stormwater management programs, id. at § 122.34(b)(2); (3) detecting and eliminating illicit discharges to the MS4, id. at § 122.34(b)(3); (4) reducing pollution to the MS4 from construction activities disturbing one acre or more, id. at § 122.34(b)(4); (5) minimizing water quality impacts from development and redevelopment activities that disturb one acre or more, id. at § 122.34(b)(5); and (6) preventing or reducing pollutant runoff from municipal activities, id. at § 122.34(b)(6). n18

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n18 The Municipal Petitioners argue that the Minimum Measures exceed EPA's statutory authority under § 402(p) of the *Clean Water Act*. We disagree. The list of elements for a regulatory program that appears in § 402(p)(6) is nonexclusive, and EPA's adoption of the Minimum Measures represents a permissible interpretation of its authority under § 402(p)(6). See *Chevron*, 467 U.S. at 843-44.

The Municipal Petitioners argue that EPA is not entitled to Chevron deference, and that the Minimum Measures must be rejected absent a clear statement of congressional intent that EPA enact the Minimum Measures. The Municipal Petitioners argue that this clear statement requirement arises because there are "significant constitutional questions" about the permissibility of the Minimum Measures under the *Tenth Amendment*, and because the Minimum Measures alter "the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency of N. Cook County*

v. Army Corps of Eng'rs, 531 U.S. 159, 173, 148 L. Ed. 2d 576, 121 S. Ct. 675 (2001).

As we explain, because the Phase II Rule includes at least one alternative to the Minimum Measures, i.e. the option of seeking a permit under 40 C.F.R. § 122.26(d), the Minimum Measures do not present significant *Tenth Amendment* problems demanding a clear statement of congressional intent. Nor does the Phase II Rule alter the federal-state balance. To the contrary, the option of seeking a permit under 40 C.F.R. § 122.26(d) maintains precisely the same federal-state balance as existed prior to the Phase II Rule. See, e.g., *NRDC v. EPA*, 966 F.2d 1292 (9th Cir. 1992) (reviewing Phase I Rule); *NRDC v. Costle*, 186 U.S. App. D.C. 147, 568 F.2d 1369, 1379 (D.C. Cir. 1977) (denying EPA authority to exempt MS4s from regulation under the *Clean Water Act*). Furthermore, even if a clear statement of congressional intent were necessary, § 402(p) of the *Clean Water Act* is replete with clear statements that Congress intended EPA to require MS4s either to obtain NPDES permits or to stop discharging stormwater.

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[*20]

The Municipal Petitioners contend that the measures regulating illicit discharges, small construction sites, and development activities unconstitutionally compel small MS4 operators to regulate third parties, i.e., upstream dischargers. The Illicit Discharge Detection and Elimination measure requires that a permit seeker prohibit non-stormwater discharges to the MS4 and implement appropriate enforcement procedures. 40 C.F.R. § 122.34(b)(3)(ii)(B). n19 The Construction Site Stormwater Runoff Control measure requires a permit seeker to implement and enforce a program to reduce stormwater pollutants from small construction sites. *Id.* at §§ 122.34(b)(4)(i)-(ii). n20 It mandates erosion and sedimentation controls, site plan reviews that take account of water quality impacts, site inspections, and the consideration of public comment, and requires that construction site operators implement erosion, sedimentation, and waste management best management practices. *Id.* The Post-Construction/New Development measure requires permit seekers to address post-construction runoff from new development and redevelopment projects disturbing one acre or more. *Id.* [*21] at § 122.34(b)(5)(ii)(B). n21

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n19 This subsection provides that permit seekers must, "to the extent allowable under State, Tribal, or local law, effectively prohibit, through ordinance or other regulatory mechanism, non-stormwater discharges into your storm sewer systems and implement appropriate enforcement procedures and actions. . . ." 40 C.F.R. § 122.34(b)(3)(ii)(B).

n20 This subsection provides that permit seekers "must develop, implement, and enforce a program to reduce pollutants in any storm water run-off to your small MS4 from construction activities that result in a land disturbance of greater than or equal to one acre. . . . [The] program must include the development and implementation of, at a minimum: (A) An ordinance or other regulatory mechanism to require erosion and sediment controls, as well as sanctions to ensure compliance, to the extent allowable under State, Tribal, or local law; (B) Requirements for construction site operators to implement appropriate erosion and sediment control best management practices; (C) Requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality; (D) Procedures for site plan review which incorporate consideration of potential water quality impacts; (E) Procedures for receipt and consideration of information submitted by the public, and (F) Procedures for site inspection and enforcement control measures." 40 C.F.R. §§ 122.34(b)(4)(i)-(ii).

[*22]

n21 This subsection provides that permit seekers must "use an ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects [disturbing one acre or more] to the extent allowable under State, Tribal or local law." 40 C.F.R. §§ 122.34(b)(5)(ii)(B).

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Noting that most MS4s are operated by municipal governments, and that "the drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised," *New Orleans Gaslight Co. v. Drainage Comm'n*, 197 U.S. 453, 460, 49 L. Ed. 831, 25 S. Ct. 471 (1905), the Municipal Petitioners argue that requiring operators of small MS4s to implement "through ordinance or other regulatory mechanism" the regulations required by the Minimum Measures contravenes the *Tenth Amendment*. See, e.g., *New York v. United States*, 505 U.S. 144, 188, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992).

EPA counters that the Phase II Rule does not violate the *Tenth Amendment* because operators[*23] of small MS4s may opt to avoid the Minimum Measures by seeking a permit under the Alternative Permit option, 40 C.F.R. § 122.33(b)(2)(ii). n22

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n22 EPA and NRDC also argue that the Minimum Measures are facially constitutional, and that the Phase II Rule presents no *Tenth Amendment* difficulties because operators of small MS4s may avoid stormwater regulation entirely by electing not to discharge stormwater into federal waters in the first place. In light of our holding with regard to the Alternative Permit option, we do not consider these arguments.

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[HN3] Under the *Tenth Amendment*, "the Federal Government may not compel States to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997); see also *New York*, 505 U.S. at 188. Similarly, the federal government may not force the States to regulate third parties in furtherance of a federal program. See *Reno v. Condon*, 528 U.S. 141, 151, 145 L. Ed. 2d 587, 120 S. Ct. 666

(2000)[*24] (upholding a federal statutory scheme because it "does not require the States in their sovereign capacity to regulate their own citizens"). These protections extend to municipalities. See, e.g., *Printz at 931 n.15*.

However, while the federal government may not compel them to do so, it may encourage States and municipalities to implement federal regulatory programs. See *New York*, 505 U.S. at 166-68. For example, the federal government may make certain federal funds available only to those States or municipalities that enact a given regulatory regime. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 205-08, 97 L. Ed. 2d 171, 107 S. Ct. 2793 (1987) (upholding federal statute conditioning state receipt of federal high-way funds on state adoption of minimum drinking age of twenty-one). The crucial proscribed element is coercion; the residents of the State or municipality must retain "the ultimate decision" as to whether or not the State or municipality will comply with the federal regulatory program. *New York*, 505 U.S. at 168. However, as long as "the alternative to implementing a federal regulatory program does not offend [*25]the Constitution's guarantees of federalism, the fact that the alternative is difficult, expensive or otherwise unappealing is insufficient to establish a *Tenth Amendment* violation." *City of Abilene v. EPA*, 325 F.3d 657, 662 (5th Cir. 2003).

With the Phase II Rule, EPA gave the operators of small MS4s a choice: either implement the regulatory program spelled out by the Minimum Measures described at 40 C.F.R. § 122.34(b), or pursue the Alternative Permit option and seek a permit under the Phase I Rule as described at 40 C.F.R. § 122.26(d). Thus, unless § 122.26(d) itself offends the Constitution's guarantees of federalism, the Phase II Rule does not violate the *Tenth Amendment*.

Pursuing a permit under the Alternative Permit option does require permit seekers, in their application for a permit to discharge, to propose management programs that address substantive concerns similar to those addressed by the Minimum Measures. See 40 C.F.R. § 122.26(d). However, § 122.26(d) lists the requirements for an application for a permit to discharge, not the requirements of the permit itself. [*26] Therefore, nothing in § 122.26(d) requires the operator of an MS4 to implement a federal regulatory program in order to receive a permit to discharge, because nothing in § 122.26(d) specifies the contents of the permit that will result from the application process.

City of Abilene, 325 F.3d 657, provides a helpful illustration. The cities of Abilene and Irving, Texas, have populations between 100,000 and 250,000, and so were

required to apply for permits under the Phase I Rule, 40 C.F.R. § 122.26(d). *City of Abilene*, 325 F.3d at 659-60. Under § 122.26(d) the cities were required to submit proposed stormwater management programs. *Id.* at 660. They negotiated the terms of those programs with EPA, and EPA eventually presented the cities with proposed management permits that contained conditions requiring the implementation of stormwater regulatory programs, and potentially requiring the regulation of third parties. *Id.* But, as the Fifth Circuit noted, this did not mean that the cities had no choice but to implement a federal regulatory program. Instead:

The Cities filed comments objecting to those[*27] conditions, and negotiations continued until the EPA offered the Cities the option of pursuing numeric end-of-pipe permits, which would have required the Cities to satisfy specific effluent limitations rather than implement management programs. The Cities declined this offer, electing to continue negotiations on the management permits.

Id. The Fifth Circuit rejected the cities' contention that the resulting permits violated the *Tenth Amendment* by requiring the cities to regulate third parties according to federal standards. *Id.* at 661-63. Because the cities chose to pursue the management permits despite the fact that EPA provided them with an option for obtaining permits that would not have involved implementing a management program or regulating third parties, no unconstitutional coercion occurred. *Id.* at 663. The ultimate decision to implement the federal program remained with the cities.

Any operator of a small MS4 that wishes to avoid the Minimum Measures may seek a permit under § 122.26(d), and, as *City of Abilene* demonstrates, nothing in § 122.26(d) will compel the operator of a small MS4 to implement a federal regulatory program[*28] or regulate third parties, because § 122.26(d) specifies application requirements, not permit requirements. Therefore, by presenting the option of seeking a permit under § 122.26(d), the Phase II Rule avoids any unconstitutional coercion. The Municipal Petitioners' claim that the Phase II Rule violates the *Tenth Amendment* therefore fails.

3. The *First Amendment* and the Minimum Measures

The Municipal Petitioners contend that the Public Education and Illicit Discharge Minimum Measures compel municipalities to deliver EPA's political message in violation of the *First Amendment*. The Phase II Rule's "Public Education and Outreach" Minimum Measure directs regulated small MS4s to "distribute educational materials to the community . . . about the impacts of

stormwater discharges on water bodies and the steps the public can take to reduce pollutants in stormwater runoff." 40 C.F.R. § 122.34(b)(1)(i). The "Illicit Discharge Detection and Elimination" measure requires regulated small MS4s to "inform public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste." 40 C.F.R. § 122.34(b)(3)(ii)(D)[*29] .

The Municipal Petitioners argue that the *First Amendment* prohibits EPA from compelling small MS4s to communicate messages that they might not otherwise wish to deliver. They further contend that EPA's interpretation of § 402(p) as authorizing these Measures does not warrant Chevron deference because it raises serious constitutional issues, but that even if deference were given, the resulting rule is unconstitutional because neither Congress nor EPA may dictate the speech of MS4s. They contend that municipalities are protected by the *First Amendment*, *PG&E v. PUC*, 475 U.S. 1, 8, 89 L. Ed. 2d 1, 106 S. Ct. 903 (1986) ("Corporations and other associations, like individuals, contribute to the [discourse] that the *First Amendment* seeks to foster"), which applies as much to compelled statements of "fact" as to those of "opinion." *Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781, 797-98, 101 L. Ed. 2d 669, 108 S. Ct. 2667 (1988).

We conclude that [HN4] the purpose of the challenged provisions is legitimate and consistent with the regulatory goals of the overall scheme of the *Clean Water Act*, cf. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 476, 138 L. Ed. 2d 585, 117 S. Ct. 2130 (1997),[*30] and does not offend the *First Amendment*. n23 The State may not constitutionally require an individual to disseminate an ideological message, *Wooley v. Maynard*, 430 U.S. 705, 713, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1976), but requiring a provider of storm sewers that discharge into national waters to educate the public about the impacts of stormwater discharge on water bodies and to inform affected parties, including the public, about the hazards of improper waste disposal falls short of compelling such speech. n24 These broad requirements do not dictate a specific message. They require appropriate educational and public information activities that need not include any specific speech at all. [HN5] A regulation is facially unconstitutional only when every possible reading compels it, *Meinhold v. U.S. DOD*, 34 F.3d 1469, 1476 (9th Cir. 1994), n25 but this is clearly not the case here.

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n23 We decline to address two further arguments raised by EPA: first, that municipalities do not receive full *First Amendment* protections, under *Muir v. Ala. Educ. TV Comm'n*, 688 F.2d 1033, 1038 n.12 (5th Cir. 1982) (en banc) ("Government expression, being unprotected by the *First Amendment*, may be subject to legislative limitation which would be impermissible if sought to be applied to private expression . . ."), and *Aldrich v. Knab*, 858 F. Supp. 1480, 1491 (W.D. Wash. 1994) (holding that "unlike private broadcasters, the state itself does not enjoy *First Amendment* rights"), and second, that even if the *First Amendment* were fully applicable, the Phase II regulations would satisfy them because MS4s may avoid the compulsion to speak by seeking a permit under the Alternative option, 40 C.F.R. § 122.26(d)(2)(iv), rather than under the Minimum Measures.

[*31]

n24 As a subsidiary matter, we note that it also falls short of compelling the MS4 to "regulate" third parties in contravention of the *Tenth Amendment*. Dispensing information to facilitate public awareness about safe disposal of toxic materials constitutes "encouragement," not regulation.

n25 [HN6] "When the constitutional validity of a statute or regulation is called into question, it is a cardinal rule that courts must first determine whether a construction is possible by which the constitutional problem may be avoided." *Meinhold*, 34 F.3d at 1476.

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As in *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 85 L. Ed. 2d 652, 105 S. Ct. 2265, 17 Ohio B. 315 (1985), where the Supreme Court upheld certain disclosure requirements in attorney advertising, "the interests at stake in this case are not of the same order as those discussed in *Wooley* [invalidating a law requiring that drivers display the motto "Live Free or Die" on New Hampshire license plates] . . . and *Barnette* [forbidding the requirement that public school students salute the[*32] flag because the

State may not impose on the individual "a ceremony so touching matters of opinion and political attitude"]." 471 U.S. at 651. EPA has not attempted to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943).

Informing the public about safe toxin disposal is non-ideological; it involves no "compelled recitation of a message" and no "affirmation of belief." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 88, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1980) (upholding state law protecting petitioning in malls and noting that "Barnette is inapposite because it involved the compelled recitation of a message containing an affirmation of belief"). It does not prohibit the MS4 from stating its own views about the proper means of managing toxic materials, or even about the Phase II Rule itself. Nor is the MS4 prevented from identifying its dissemination of public information as required by federal law, or from making available[*33] federally produced informational materials on the subject and identifying them as such.

Even if such a loosely defined public information requirement could be read as compelling speech, the regulation resembles another regulation that the Supreme Court has held permissible. In *Glickman*, 521 U.S. 457, 138 L. Ed. 2d 585, 117 S. Ct. 2130, the Court upheld a generic advertising assessment promulgated by the Department of Agriculture on behalf of California tree fruit growers because the order was consistent with an overall regulatory program that did not abridge protected speech:

Three characteristics of the regulatory scheme at issue distinguish it from laws that we have found to abridge the freedom of speech protected by the *First Amendment*. First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views. Indeed, since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, [*34] it is fair to presume that they agree with the central message of the speech that is generated by the generic program.

Id. at 469-70 (footnotes omitted). Here, as in *Glickman*, the Phase II regulations impose no restraint on the freedom of any MS4 to communicate any message to any audience. They do not compel any specific speech, nor do they compel endorsement of political or ideological views. And since all permittees are engaged in the

handling of stormwater runoff that must be conveyed in reasonably unpolluted form to national waters, it is similarly fair to presume that they will agree with the central message of a public safety alert encouraging proper disposal of toxic materials. n26 The Phase II regulation departs only from the second element in the *Glickman* analysis, because the public information requirement may compel a regulated party to engage in some speech at some time; but unlike the offensive messages in *Maynard* and *Barnette* (and even the inoffensive advertising messages at issue in *Glickman*) that speech is not specified by the regulation. n27

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n26 In its most recent treatment of compelled speech, the Supreme Court held that a generic advertising campaign violated free speech where the message was specific and antagonistic to the preferred advertising message of the plaintiff, and the regulation compelling participation was not part of a broader regulatory apparatus already constraining the plaintiff's autonomy in the relevant arena. *United States Dep't. of Agric. v. United Foods*, 533 U.S. 405, 410-17, 150 L. Ed. 2d 438, 121 S. Ct. 2334 (2001). The court distinguished this advertising program from the one in *Glickman* on the latter point: "the program sustained in *Glickman* differs from the one under review in a most fundamental respect. In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting market autonomy." 533 U.S. at 411. Although the Phase II Rule is not an advertising or marketing regulation, it constitutes a "comprehensive program" restricting the autonomy of MS4s in the relevant arena of controlling toxic discharges to storm sewers that drain to U.S. waters.

[*35]

n27 In deciding the similar question of whether a regulation impermissibly compelled speech by requiring manufacturers of mercury-containing products to inform consumers how to dispose safely of the toxic material, the Second Circuit held that "mandated disclosure of accurate, factual, commercial information does not offend the core *First Amendment* values of promoting efficient exchange of information or protecting individual liberty interests." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001). What speech may follow from the Phase II directive will not be

"commercial" in the same sense that manufacturer labeling is, but it will be similar in substance to *Sorrell* to the extent that it informs the public how to dispose safely of toxins. We think the policy considerations underlying the commercial speech treatment of labeling requirements, see, e.g., the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1333-39, apply similarly in the context of the market-participant municipal storm sewer provider.

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The public information[*36] requirement does not impermissibly compel speech, and nothing else in the Phase II Rule offends the *First Amendment*. n28 The Rule does not compel a recitation of a specific message, let alone an affirmation of belief. To the extent MS4s are regulated by the public information requirement, the regulation is consistent with the overall regulatory program of the *Clean Water Act* and the responsibilities of point source dischargers.

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n28 The Alternative option contains a public education requirement that is similar but even less specific, and therefore even less burdensome, than the requirements in the Minimum Measures. See § 122.26(d)(2)(iv)(B)(6) (requiring permit seekers to propose programs to counter illicit discharges, including a "description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials").

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4. Notice and Comment on the Alternative Permit Option

The Municipal Petitioners[*37] contend that, in adopting the Alternative Permit option, EPA did not

comply with the minimum notice and comment procedures required in informal rulemaking by the Administrative Procedures Act ("APA"), 5 U.S.C. § 553. [HN7] The APA requires an agency to publish notice of a proposed rulemaking that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved." Id. at 553(b)(3).

We have held that [HN8] a "final regulation that varies from the proposal, even substantially, will be valid as long as it is 'in character with the original proposal and a logical outgrowth of the notice and comments.'" *Hodge v. Dalson*, 107 F.3d 705, 712 (9th Cir. 1997). In determining whether notice was adequate, we consider whether the complaining party should have anticipated that a particular requirement might be imposed. The test is whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule. *Am. Water Works Ass'n v. EPA*, 309 U.S. App. D.C. 235, 40 F.3d 1266, 1274 (D.C. Cir. 1994).

The Municipal[*38] Petitioners argue that the Alternative Permit option is not a logical outgrowth of EPA's proposed rule because, although numerous alternatives were discussed in the Preamble to the proposed rule, 63 Fed. Reg. at 1554-1557, the Alternative Permit option eventually adopted was not. EPA counters that the proposed rule included a supplementary alternative permitting system based on concepts similar to those in the Minimum Measures, including "simplified individual permit application requirements." n29 EPA contends that the Alternative Permit option was a logical outgrowth of the comments it received on the proposal expressing concern that the Minimum Measures might violate the *Tenth Amendment*. 64 Fed. Reg. at 68,765.

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n29 Municipal Petitioners concede that "simplified individual permit application requirements" were discussed, but they contend that the permit requirements discussed are not sufficiently similar to those promulgated to establish a logical outgrowth.

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The Alternative Permit[*39] option passes the Hodge test. The proposed rule suggested an individualized permitting option to be developed in response to comments during the notice and comment period. The Alternative option contains no elements that were not part of the original rule, even if they are configured differently in the final rule. Petitioners had, and took, their opportunity to object to the aspects of the Rule that they did not support in their comments on the Minimum Measures.

B. The General Permit Option and Notices of Intent

The Environmental Petitioners contend that the general permitting scheme of the Phase II Rule allows regulated small MS4s to design stormwater pollution control programs without adequate regulatory and public oversight, and that it contravenes the *Clean Water Act* because it does not require EPA to review the content of dischargers' notices of intent and does not contain express requirements for public participation in the NPDES permitting process.

[HN9] In reviewing a federal administrative agency's interpretation of a statute it administers, we first determine whether Congress has expressed its intent unambiguously on the question before the court. See *Chevron*, 467 U.S. 837, 842-44, 81 L. Ed. 2d 694, 104 S. Ct. 2778[*40] ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). "If, instead, Congress has left a gap for the administrative agency to fill, we proceed to step two. At step two, we must uphold the administrative regulation unless it is arbitrary, capricious, or manifestly contrary to the statute." *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1162, amended by 197 F.3d 1035 (9th Cir. 1999) (citations and internal quotations omitted).

We conclude that [HN10] the Phase II General Permit option violates the *Clean Water Act's* requirement that permits for discharges "require controls to reduce the discharge of pollutants to the maximum extent practicable," 33 U.S.C. § 1342(p)(3)(B)(iii). We also conclude that [HN11] the Phase II General Permit option violates the *Clean Water Act* because it does not contain express requirements for public participation in the NPDES permitting process. We remand these aspects of the Phase II Rule. n30

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n30 EPA argues that the Environmental Petitioner's challenge is not ripe for review because "the question of whether some general permit somewhere might fail to assure that pollutants are reduced to the maximum extent practicable is not ripe for review." But we are not addressing the merits of any specific permit. Rather, the question before us "is purely one of statutory interpretation that would not benefit from further factual development of the issues presented." *Whitman v. Am. Trucking*, 531 U.S. 457, 479, 149 L. Ed. 2d 1, 121 S. Ct. 903 (2001). Specifically, we are addressing whether EPA, in promulgating the Phase II Rule, has accomplished the substantive controls for municipal stormwater that Congress mandated in § 402(p) of the *Clean Water Act*. As we held in *NRDC v. EPA*, 966 F.2d at 1296-97, 1308, this question is ripe for review.

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1. Phase II General Permits and Notices of Intent

[HN12] Primary responsibility for enforcement of the requirements of the *Clean Water Act* is vested in the Administrator of the EPA. 33 U.S.C. § 1251(d); see also 33 U.S.C. § 1361(a) ("The Administrator [of EPA] is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter."). The *Clean Water Act* renders illegal any discharge of pollutants not specifically authorized by a permit. 33 U.S.C. § 1311(a) ("Except in compliance with this section and [other sections detailing permitting requirements] of this title, the discharge of any pollutant by any person shall be unlawful."). Under the Phase II Rule, dischargers may apply for an individualized permit with the relevant permitting authority, or may file a "Notice of Intent" ("NOI") to seek coverage under a "general permit." 40 C.F.R. § 122.33(b).

A general permit is a tool by which EPA regulates a large number of similar dischargers. Under the traditional general permitting model, each general permit identifies the output limitations[*42] and technology-based requirements necessary to adequately protect water quality from a class of dischargers. Those dischargers may then acquire permission to discharge under the *Clean Water Act* by filing NOIs, which embody each discharger's agreement to abide by the terms of the general permit. Because the NOI represents no more than a formal acceptance of terms elaborated elsewhere, EPA's approach does not require that permitting

authorities review an NOI before the party who submitted the NOI is allowed to discharge. General permitting has long been recognized as a lawful means of authorizing discharges. *NRDC v. Costle*, 186 U.S. App. D.C. 147, 568 F.2d 1369 (D.C. Cir. 1977).

The Phase II general permitting scheme differs from the traditional general permitting model. The *Clean Water Act* requires EPA to ensure that operators of small MS4s "reduce the discharge of pollutants to the maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B). To ensure that operators of small MS4s achieve this "maximum extent practicable" standard, the Phase II Rule requires that each NOI contain information on an individualized pollution control [*43]program that addresses each of the six general criteria specified in the Minimum Measures; thus, according to the Phase II Rule, submitting an NOI and implementing the Minimum Measures it contains "constitutes compliance with the standard of reducing pollutants to the 'maximum extent practicable.'" 40 C.F.R. § 122.34(a).

Because a Phase II NOI establishes what the discharger will do to reduce discharges to the "maximum extent practicable," the Phase II NOI crosses the threshold from being an item of procedural correspondence to being a substantive component of a regulatory regime. The text of the Rule itself acknowledges that a Phase II NOI is a permit application that is, at least in some regards, functionally equivalent to a detailed application for an individualized permit. See, e.g., 40 C.F.R. § 122.34(d)(1) ("In your permit application (either a notice of intent for coverage under a general permit or an individual permit application), you must identify and submit to your NPDES permitting authority the following information . . ."). For this reason, EPA rejected the possibility of providing a "form NOI" to Phase II permittees, [*44] explaining that "what will be required on an MS4's NOI . . . is more extensive than what is usually required on an NOI, so a 'form' NOI for MS4s may be impractical." 64 *Fed. Reg.* at 68,764.

2. Failure to Regulate

The Environmental Petitioners argue that, by allowing NPDES authorities to grant dischargers permits based on unreviewed NOIs, the Rule creates an impermissible self-regulatory system. n31 Petitioners contend the Rule impermissibly fails to require that the permitting authority review an NOI to assure compliance with *Clean Water Act* standards, including the standard that municipal stormwater pollution be reduced to "the maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B)(iii). See 40 C.F.R. § 123.35 (setting out requirements for permitting authorities, but not requiring review of NOI); 64 *Fed. Reg.* at 68,764 ("EPA disagrees

that formal approval or disapproval by the permitting authority is needed").

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n31 Petitioners suggest that EPA should be held to the standard it espoused to procure judicial approval for the Phase I program. In 1991, responding to NRDC's assertion that the Phase I Rule failed to set "hard criteria" for review of MS4 stormwater programs, EPA responded that "inadequate proposals will result in the denial of permit applications." Respondent's Brief at 67, *NRDC v. EPA*, 966 F.2d 1292 (9th Cir. 1992) (Nos. 91-70200, 91-70176, & 90-70671). Petitioners contend that this court relied on that representation in ruling for EPA on that issue. *NRDC v. EPA*, 966 F.2d at 1308 n.17 ("Individual NPDES permit writers . . . will decide whether application proposals are adequate . . .").

-----End Footnotes-----

[*45]

EPA maintains that the Phase II permit system is fully consistent with the authorizing statute. It contends that § 402(p)(6) granted EPA flexibility in designing the Phase II "comprehensive program," and notes that while the statute does not require general permits, neither does it preclude them. EPA contends that Congress delegated the task of designing the program to EPA, and that EPA reasonably adopted a "flexible version" of the NPDES permit program to suit the unique needs of the Phase II program. It disputes that the general permit program creates "paper tigers," especially since EPA, States, and citizens may initiate enforcement actions. Finally, EPA argues that the Rule does not create a self-regulatory program, but that even if it did, nothing in § 402(p)(6) precludes such a program.

Reviewing the Phase II Rule under the first step of *Chevron*, we note that the plain language of § 402(p) of the *Clean Water Act*, 33 U.S.C. § 1342(p), expresses unambiguously Congress's intent that EPA issue no permits to discharge from municipal storm sewers unless those permits "require controls to reduce the discharge of pollutants to the maximum extent practicable.[*46]"

Phase II general permits will likely impose requirements that ensure that operators of small MS4s

comply with many of the standards of the *Clean Water Act*. Thus, general permits issued under Phase II will ordinarily contain numerous substantive requirements, just as did the permits issued under Phase I. See 40 C.F.R. §§ 123.35 & 123.35(a) ("§ 123.35 As the NPDES Permitting Authority for regulated small MS4s, what is my role? (a) You must comply with the requirements for all NPDES permitting authorities under *Parts 122, 123, 124 and 125* of this chapter."); see also 40 C.F.R. § 122.28 (outlining requirements for NPDES authorities issuing general permits). And every operator of a small MS4 who files an NOI under Phase II "must comply with other applicable NPDES permit requirements, standards, and conditions established in the . . . general permit." See 40 C.F.R. §§ 122.34 & 122.34(f).

However, while each Phase II general permit will likely ensure that operators of small MS4s comply with certain standards of the *Clean Water Act*, they will not "require controls to reduce the discharge of pollutants[*47] to the maximum extent practicable." According to the Phase II Rule, the operator of a small MS4 has complied with the requirement of reducing discharges to the "maximum extent practicable" when it implements its stormwater management program, i.e., when it implements its Minimum Measures. 40 C.F.R. § 122.34(a); see also 64 *Fed. Reg.* at 68753 (stating EPA's anticipation that limitations more stringent than the minimum control measures "will be unnecessary"). Nothing in the Phase II regulations requires that NPDES permitting authorities review these Minimum Measures to ensure that the measures that any given operator of a small MS4 has decided to undertake will in fact reduce discharges to the maximum extent practicable. n32 See 40 C.F.R. § 123.35 ("As the NPDES Permitting Authority for regulated small MS4s, what is my role?"). Therefore, under the Phase II Rule, nothing prevents the operator of a small MS4 from misunderstanding or misrepresenting its own stormwater situation and proposing a set of minimum measures for itself that would reduce discharges by far less than the maximum extent practicable.

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n32 That the Rule allows a permitting authority to review an NOI is not enough; every permit must comply with the standards articulated by the *Clean Water Act*, and unless every NOI issued under a general permit is reviewed, there is no way to ensure that such compliance has been achieved.

The regulations do require NPDES permitting authorities to provide operators of small MS4s with "menus" of management practices to assist in implementing their Minimum Measures, see 40 C.F.R. § 123.35(g), but again, nothing requires that the combination of items that the operator of a small MS4 selects from this "menu" will have the combined effect of reducing discharges to the maximum extent practicable.

Nor is the availability of citizen enforcement actions a substitute for EPA's enforcement responsibility, especially because, as discussed below, the Rule does not require that NOIs be publicly available. Absent review on the front end of permitting, the general permitting regulatory program loses meaning even as a procedural exercise.

-----End Footnotes-----

[*48]

In fact, under the Phase II Rule, in order to receive the protection of a general permit, the operator of a small MS4 needs to do nothing more than decide for itself what reduction in discharges would be the maximum practical reduction. No one will review that operator's decision to make sure that it was reasonable, or even good faith. n33 Therefore, as the Phase II Rule stands, EPA would allow permits to issue that would do less than require controls to reduce the discharge of pollutants to the maximum extent practicable. n34 See 64 Fed. Reg. at 68753 (explaining that the minimum control measures will protect water quality if they are "properly implemented"). We therefore must reject this aspect of the Phase II Rule as contrary to the clear intent of Congress. Cf. *NRDC*, 966 F.2d at 1305 (rejecting as arbitrary and capricious a permitting system that allowed regulated industrial stormwater dischargers to "self-report" whether they needed permit coverage).

-----Footnotes-----

n33 EPA identifies no other general permitting program that leaves the choice of substantive pollution control requirements to the regulated entity, and we are not persuaded by the analogy it urges to the traditional model of general permitting (where NOIs routinely are not reviewed), because, as we

have noted, the Phase II general permit model is substantially dissimilar.

[*49]

n34 In its petition for rehearing, EPA argues for the first time that because the regulations require NPDES Permitting Authorities to include in general permits "any additional measures necessary" to ensure that the maximum extent practicable standard is met, 40 C.F.R. §§ 123.35(h)(1), 123.35(f) (incorporating by reference the "maximum extent practicable" requirement of 40 C.F.R. §§ 122.34(a)), 122.34(f) (requiring small MS4s to comply with additional measures), the Phase II Rule ensures that discharges will be reduced to the maximum extent practicable.

The trouble with EPA's reasoning is that the Phase II Rule defines the "maximum extent practicable" standard in such a way that no "additional measures" will ever be necessary under § 123.35(h)(1). While a Permitting Authority may impose additional measures, nothing compels it to do so because, merely by implementing the best management practices that the operator of a small MS4 has chosen for itself, that small MS4 will already have met the "maximum extent practicable" standard. See 40 C.F.R. § 122.34(a).

-----End Footnotes-----

[*50]

Involving regulated parties in the development of individualized stormwater pollution control programs is a laudable step consistent with the directive to consult with state and local authorities in the development of the § 402(p)(6) comprehensive program. But EPA is still required to ensure that the individual programs adopted are consistent with the law. Our holding should not prevent the Phase II general permitting program from proceeding mostly as planned. Our holding does not preclude regulated parties from designing aspects of their own stormwater management programs, as contemplated under the Phase II Rule. However, stormwater management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable. We therefore remand this aspect of the Rule.

3. Public Participation

The Environmental Petitioners contend that the Phase II Rule fails to provide for public participation as required by the *Clean Water Act*, because the public receives neither notice nor opportunity for hearing regarding[*51] an NOI. The EPA replies on the one hand by arguing that NOIs are not "permits" and therefore are not subject to the public availability and public hearing requirements of the *Clean Water Act*, and on the other hand by arguing that the combination of the public involvement minimum measure, 40 C.F.R. § 122.34(b)(2), the Federal Freedom of Information Act, 5 U.S.C. § 552, and state freedom of information acts would fulfill any such requirements if NOIs were permits.

Reviewing the Phase II Rule under *Chevron* step one, we conclude that clear Congressional intent requires that NOIs be subject to the *Clean Water Act*'s public availability and public hearings requirements. [HN13] *The Clean Water Act* requires that "[a] copy of each permit application and each permit issued under [the NPDES permitting program] shall be available to the public," 33 U.S.C. § 1342(j), and that the public shall have an opportunity for a hearing before an permit application is approved, 33 U.S.C. § 1342(a)(1). Congress identified public participation rights as a critical means of advancing the goals of the *Clean Water Act* [*52] *Act* in its primary statement of the Act's approach and philosophy. See 33 U.S.C. § 1251(e); see also *Costle v. Pac. Legal Found.*, 445 U.S. 198, 216, 63 L. Ed. 2d 329, 100 S. Ct. 1095 (1980) (noting the "general policy of encouraging public participation is applicable to the administration of the NPDES permit program"). EPA has acknowledged that technical issues relating to the issuance of NPDES permits should be decided in "the most open, accessible forum possible, and at a stage where the [permitting authority] has the greatest flexibility to make appropriate modifications to the permit." 44 Fed. Reg. 32,854, 32,885 (June 7, 1979).

As we noted above, under the Phase II Rule it is the NOIs, and not the general permits, that contain the substantive information about how the operator of a small MS4 will reduce discharges to the maximum extent practicable. Under the Phase II Rule, NOIs are functionally equivalent to the permit applications Congress envisioned when it created the *Clean Water Act*'s public availability and public hearing requirements. Thus, if the Phase II Rule does not make NOIs "available to the public," and[*53] does not provide for public hearings on NOIs, the Phase II Rule violates the clear intent of Congress. EPA's first argument -- that NOIs are not subject to the public availability and public hearings requirements of the *Clean Water Act* -- therefore fails.

We therefore reject the Phase II Rule as contrary to the clear intent of Congress insofar as it does not provide for public hearings on NOIs as required by 33 U.S.C. § 1342(a)(1). However, Congress has not directly addressed the question of what would constitute an NOI being "available to the public" as required by 33 U.S.C. § 1342(j). Under *Chevron* step two, we must defer to EPA's interpretation of "available to the public" unless it is arbitrary, capricious, or manifestly contrary to the statute.

EPA argues that the NOIs are "available to the public" as a result of the combined effects of the public participation minimum measures, and of federal and state freedom of information acts. This argument is unconvincing. First, the public participation Minimum Measure only requires dischargers to design a program minimally consistent with State, Tribal, and local requirements. 40 C.F.R. § 122.34(b)(2) [*54] . Second, the federal *Freedom of Information Act* only applies to documents that are actually in EPA's possession, not to documents that are in the possession of state or tribal NPDES authorities, see 40 C.F.R. § 2 (providing EPA's policy for releasing documents under the federal *Freedom of Information Act*), and nothing in the Phase II Rule provides that EPA obtain possession of every NOI that is submitted to a NPDES permitting authority. See 40 C.F.R. § 123.41(a) (making information provided to state NPDES authorities available to EPA only upon request). Thus, under the Phase II Rule, NOIs will only "be available to the public" subject to the vagaries of state and local freedom of information acts. We conclude that EPA's interpretation of 33 U.S.C. § 1342(j), as embodied in the provisions of the Phase II Rule providing for the public availability of NOIs, is manifestly contrary to the *Clean Water Act*, which contemplates greater scope, greater certainty, and greater uniformity of public availability than the Phase II Rule provides. We therefore reject this aspect of the Phase II Rule. n35

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n35 EPA argues for the first time in its petition for rehearing that NOIs will be publicly available under 40 C.F.R. § 122.34(g)(2). Addressing operators of regulated small MS4s, this section provides: "You must make your records, including a description of your storm water management program, available to the public at reasonable times during regular business hours." While this section does seem to provide for the public availability of a small MS4's records, we

are troubled that nothing in EPA's initial briefs indicated that EPA considered NOIs to be subject to this section. We normally defer to an agency's interpretations of its own regulations, but we may decline to defer to the post hoc rationalizations of appellate counsel. See, e.g., *Martin v. OSHRC*, 499 U.S. 144 at 150, 156, 113 L. Ed. 2d 117, 111 S. Ct. 1171 (1991). If EPA intends this section to provide for the public availability of NOIs -- for example because it intends NOIs to be among the records subject to this section -- it may clarify on remand.

-----End Footnotes-----

[*55]

In sum, we conclude that EPA's failure to require review of NOIs, which are the functional equivalents of permits under the Phase II General Permit option, and EPA's failure to make NOIs available to the public or subject to public hearings contravene the express requirements of the *Clean Water Act*. We therefore vacate those portions of the Phase II Rule that address these procedural issues relating to the issuance of NOIs under the Small MS4 General Permit option, and remand so that EPA may take appropriate action to comply with the *Clean Water Act*.

C. Failure to Designate

We reject the Environmental Petitioners' contention that EPA's failure to designate for Phase II regulation serious sources of stormwater pollution, including certain industrial ("Group A") sources and forest roads, was arbitrary and capricious. See *Marsh v. Or. Nat'l Res. Council*, 490 U.S. 360, 378, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989). n36

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n36 [HN14] Agency determinations based on the record are reviewed under the "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). The standard is narrow and the reviewing court may not substitute its judgment for that of the agency. *Marsh*, 490 U.S. at 378. However, the agency must articulate a rational connection between the facts found and the conclusions made. *Washington v. Daley*, 173 F.3d 1158, 1169 (9th Cir. 1999). The reviewing court must determine whether the decision was based on a

consideration of the relevant factors and whether there has been a clear error of judgment. *Marsh*, 490 U.S. at 378. The court may reverse under the "arbitrary and capricious" standard only if the agency:

has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 at 43.

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[*56]

1. "Group A" Facilities

In addition to the small MS4s and construction sites ultimately designated for regulation under the Phase II Rule, EPA evaluated a variety of other point-source discharge categories for potential Phase II regulation. One group of dischargers (referred to as the "Group A" facilities) included sources that "are very similar, or identical" to regulated stormwater discharges associated with industrial activity that were not designated for Phase I regulation for administrative reasons unrelated to their environmental impacts. n37 64 Fed. Reg. at 68,779. EPA estimates that Group A includes approximately 100,000 facilities, including auxiliary facilities and secondary activities ("e.g., maintenance of construction equipment and vehicles, local trucking for an unregulated facility such as a grocery store," id.) and facilities intentionally omitted from Phase I designation ("e.g., publicly owned treatment works with a design flow of less than 1 million gallons per day, landfills that have not received industrial waste," id.).

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n37 EPA explains that the Group A facilities were not regulated with the other Phase I sources because EPA used Standard Industrial Classification Index (SIC) codes in defining the universe of regulated industrial activities: "By relying on SIC codes, a

classification system created to identify industries rather than environmental impacts from these industries [sic] discharges, some types of storm water discharges that might otherwise be considered 'industrial' were not included in the existing NPDES storm water program." 64 Fed. Reg. at 68,779.

-----End Footnotes-----

[*57]

The Environmental Petitioners contend that EPA should have designated the Group A facilities for categorical Phase II regulation after finding (1) that stormwater discharges from these facilities are the same as those from the industrial sources regulated under Phase I, and (2) that such discharges may cause "adverse water quality impacts." Id. Petitioners argue that these findings, and EPA's failure to provide individualized analysis regarding whether any specific source category within Group A requires regulation, render EPA's decision not to regulate any of these sources under the Rule arbitrary and capricious. They maintain that EPA's "line-drawing," which regulates some pollution sources but leaves nearly identical sources unregulated without any persuasive rationale, is necessarily arbitrary and capricious. See *NRDC, 966 F.2d at 1306* (EPA's decision not to regulate construction sites smaller than five acres was arbitrary when EPA provided no data to justify the five-acre threshold and admitted that unregulated sites could have significant water quality impacts).

Petitioners argue that § 402(p)(6) at least required EPA to make findings [*58]with respect to individual Group A categories, and that data collected from Phase I permit applications could be used to evaluate the pollutant potential of the identical Group A sources. They contend that these findings should have sufficed as a basis for designating at least some Group A sources, and that EPA's conclusion that it lacked adequate nationwide data upon which to designate any of these sources is not supported by the record evidence. Comparing EPA's identification of the serious polluting potential of some of these sources with its statutory mandate under § 402(p)(6) "to protect water quality," they argue that EPA fails even the forgiving standard of arbitrary and capricious review in that it has "offered an explanation for its decision that runs counter to the evidence before [it]" and "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." See *Motor Vehicle Mfrs., 463 U.S. at 43*.

EPA maintains that it considered Group A facilities' similarity to already regulated sources as only one of several criteria that it used in designating sources for regulation under Phase II, 64 Fed. Reg. at 68,780.[*59] and that sources that appear "similarly situated" under one criterion are not necessarily similarly situated under all. EPA asserts that nothing in § 402(p)(6) implied a responsibility to make individualized findings regarding each Group A subcategory, and it maintains that it simply lacked sufficient data to support nation-wide designation of the Group A facilities. EPA notes that, after failing to receive requested comment providing such data, it proposed instead "to protect water quality" by allowing regional regulation of problem Group A facilities under the residual designation authority. EPA contends that agencies must be afforded deference in determining the data necessary to support regulatory decisionmaking and that it reasonably determined the quantum of data it would need to support the designation of additional sources on a nationwide basis. See *Sierra Club v. EPA, 334 U.S. App. D.C. 421, 167 F.3d 658, 662 (D.C. Cir. 1999)*.

We conclude that sufficient evidence supports EPA's decision not to designate Group A sources on a nationwide basis, and instead to establish local and regional designation authority to account for these sources and protect water quality.[*60] Although we are troubled by the purely administrative basis for the distinction between facilities regulated under the Phase I Rule and the Group A facilities that remain unregulated under Phase II, n38 EPA's choice of the Phase I standard for designation is not the issue before us. Before us is whether EPA acted arbitrarily in declining to designate the Group A sources on a nationwide basis under the Phase II Rule, and we cannot say that it did.

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n38 As discussed in footnote 37, Group A facilities were not regulated with other Phase I industrial sources based on a government coding system used to distinguish different types of industry (without reference to their similar environmental impacts). See 64 Fed. Reg. at 68,779.

-----End Footnotes-----

EPA has articulated a rational connection between record facts indicating insufficient data to categorically regulate Group A facilities and its corresponding conclusion not to do so, and we defer to that decision. See *Washington v. Daley*, 173 F.3d 1158, 1169 (9th Cir. 1999).[*61] In the text of the Rule, EPA explains that the process behind its decision not to nationally designate Group A sources for Phase II regulation focused not only on the likelihood of contamination from a source category, but also on the sufficiency of national data about each category and whether pollution concerns were adequately addressed by existing environmental regulations. n39 We cannot say that EPA relied on factors Congress had not intended it to consider, that it failed to consider an important aspect of the problem, or that its rationale is implausible. See *Motor Vehicle Mfrs.*, 463 U.S. at 43. Nor did EPA's decision run counter to the evidence before it. *Id.* The Environmental Petitioners allege that its decision not to regulate Group A facilities runs counter to evidence that similar sources are highly polluting, but as EPA considered evidence beyond those similarities that persuaded it not to regulate, we cannot say that EPA's decision is unsupported by the record. Nothing in § 402(p)(6) unambiguously requires EPA to evaluate the Group A source categories individually, and we defer to EPA's interpretation of the statute it is charged with administering. [*62]See *Royal Foods Co. v. RJR Holdings*, 252 F.3d 1102, 1106 (9th Cir. 2001).

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n39 "In identifying potential categories of sources for designation in today's notice, EPA considered designation of discharges from Group A and Group B facilities. EPA applied three criteria to each potential category in both groups to determine the need for designation: (1) The likelihood for exposure of pollutant sources included in that category, (2) whether such sources were adequately addressed by other environmental programs, and (3) whether sufficient data were available at this time on which to make a determination of potential adverse water quality impacts for the category of sources. As discussed previously, EPA searched for applicable nationwide data on the water quality impacts of such categories of facilities. . . .

"EPA's application of the first criterion showed that a number of Group A and B sources have a high likelihood of exposure of pollutants. . . . Application of the second criterion showed that some categories were likely to be adequately addressed by other programs.

"After application of the third criterion, availability of nationwide data on the various storm water discharge categories, EPA concluded that available data would not support any such nationwide designations. While such data could exist on a regional or local basis, EPA believes that permitting authorities should have flexibility to regulate only those categories of sources contributing to localized water quality impairments. . . . If sufficient regional or nationwide data become available in the future, the permitting authority could at that time designate a category of sources or individual sources on a case-by-case basis." 64 Fed. Reg. at 68,780.

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[*63]

2. Forest Roads

The Environmental Petitioners also contend that EPA arbitrarily failed to regulate forest roads under the Rule despite clear evidence in the record documenting the need for stormwater pollution control of drainage from these roads. Petitioners again contend that this agency action is arbitrary, because EPA has offered an explanation for its decision that runs counter to the evidence before it.

Petitioners point to EPA's own conclusion that forest roads "are considered to be the major source of erosion from forested lands, contributing up to 90 percent of the total sediment production from forestry operations." n40 They note that both unimproved forest roads and construction sites create large expanses of non-vegetated soil subject to stormwater erosion, and argue that construction site data thus also support regulation of forest roads. Petitioners observe that EPA has cited no contrary evidence indicating that forest roads are not sources of stormwater pollutant discharges to U.S. waters, and they argue that Phase II regulation is necessary "to protect water quality," because proper planning and road design can minimize erosion and prevent stream sedimentation. [*64] Petitioners note that this court has previously held that, in the absence of such "supportable facts," EPA is not entitled to the usual assumption that it has "rationally exercised the duties delegated to it by Congress." *NRDC*, 966 F.2d at 1305.

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n40 Guidance Specifying Management Measures For Sources of Nonpoint Pollution in Coastal Waters, EPA guidance paper 840-B-93-001c (Jan. 1993), available at <http://www.epa.gov/owow/nps/mmgi/index.html> (last visited Sept. 18, 2002) ("Coastal Waters").

source discharges of dredged or fill material which may require a *CWA section 404* permit (See *33 CFR 209.120* and *part 233*).

40 C.F.R. § 122.27(b)(1).

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EPA's response is that we have no jurisdiction to hear this challenge, chiefly because, it believes, the challenge is time-barred by Clean Water Act § 509(b)(1), *33 U.S.C. § 1369(b)(1)* (providing that "application for review shall be made within 120 days from the date of [agency action]"). EPA promulgated silviculture regulations in 1976 that exclude from NPDES permit requirements certain silvicultural activities that EPA determined constitute non-point [*65]source activities, including "surface drainage, or road construction and maintenance from which there is natural run-off." *40 C.F.R. § 122.27(b)(1)*. n41 EPA asserts that the exclusion applies to forest roads in general, not only to "construction" and "maintenance" -- an assertion disputed by Petitioners -- and that any challenge to the decision not to regulate forest roads should have been brought within 120 days of the promulgation of that rule. See *33 U.S.C. § 1369(b)(1)*.

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n41 The provision provides in full as follows:

Silvicultural point source means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff. However, some of these activities (such as stream crossing for roads) may involve point

[*66]

EPA's argument might be more persuasive if Petitioners' contention could be understood essentially as a direct challenge to the 1976 silviculture regulations, but this is not the case. Even were we to assume that EPA exempted forest roads from NPDES permit requirements in 1976 under *40 C.F.R. § 122.27(b)(1)*, that would not resolve the question whether EPA should have addressed forest roads in its "comprehensive program . . . to protect water quality" under *§ 402(p)(6)*, because *§ 402(p)(6)* was not enacted until 1987. Petitioners challenge EPA's decision not to regulate under the new portion of the statute, not the decision not to regulate under other provisions that were in effect earlier.

EPA argues in the alternative that Petitioners should have sought judicial review when EPA considered amending *§ 122.27(b)(1)* -- to delete the language that it asserts renders forest roads non-point sources -- but then determined not to make the amendment. However, we are aware of no statute or legal doctrine providing that a party's failure to challenge an agency's decision not to amend its rules in one proceeding deprives the party of the right to challenge, in [*67]a contemporaneous proceeding, the promulgation of an entire new rule which could have, but did not, provide the full relief the party seeks. Assuming that EPA is correct that *§ 122.27(b)(1)* defines forest roads as non-point sources, both the Phase II Rule proceedings and the proceedings in which the proposed amendment to *§ 122.27(b)(1)* was considered and rejected were proper proceedings in which to raise the issue whether discharges from forest roads should be regulated. Petitioners chose to raise the issue in their comments to the proposed Phase II Rule, because they believed that *Clean Water Act § 402(p)(6)* mandates the regulation of forest roads. They did not lose their right to challenge the final Phase II Rule's failure to regulate forest roads simply because they did not also raise a challenge to EPA's failure to adopt an amendment to *§ 122.27(b)(1)* that the agency initially proposed. (We note, incidentally, that it appears that even a successful challenge to *§ 122.27(b)(1)* would likely not have achieved the objective the Environmental Petitioners

sought: it would only have allowed case-by-case coverage for forest roads, and not for overall coverage.)

Finally, EPA suggests[*68] that Petitioners' comments during the Phase II rulemaking process were too short to create jurisdiction in this court to hear this challenge. However, EPA exaggerates the slightness of those comments, which comprised two paragraphs, with footnotes, stating objections and providing support. We also agree with Petitioners that EPA was aware of the forest road sedimentation problem at the time of the rulemaking. n42 Indeed, EPA responded to the comments without disputing that the problem is serious. 3 EPA, Response to Public Comments 8 (Oct. 29, 1999). Rather, the agency relied on 40 C.F.R. § 122.27(b)(1), indicating that it was barred from acting under the Phase II Rule by § 122.27(b)(1).

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n42 Nonpoint Source Pollution: The Nation's Largest Water Quality Problem, EPA841-F-96-004A ("Pointer # 1") ("The latest National Water Quality Inventory indicates that agriculture is the leading contributor to water quality impairments, degrading 60 percent of the impaired river miles and half of the impaired lake acreage surveyed by states, territories, and tribes.").

-----End Footnotes-----

[*69]

EPA does not seriously address the merits of Petitioners' objections to the Rule in its brief to this court. Instead, EPA relies almost entirely on its assertion that we lack jurisdiction to decide this question. It does, however, strongly imply that its failure to adopt its own proposed amendment in the proceeding pertaining to § 122.27(b)(1) relieves it of its obligation to consider including forest roads in the Phase II Rule proceedings. We reject any such contention. Petitioners' assertion that § 402(p)(6) requires that the Phase II Rule contain provisions regulating forest roads necessitates a response from EPA on the merits.

Having concluded that the objections of the Environmental Petitioners are not time-barred, and that we have jurisdiction to hear them, but that EPA failed to consider those objections on the merits, we remand this

issue to the EPA, so that it may consider in an appropriate proceeding Petitioners' contention that § 402(p)(6) requires EPA to regulate forest roads. EPA may then either accept Petitioners' arguments in whole or in part, or reject them on the basis of valid reasons that are adequately set forth to permit judicial review.

D. AF&PA's [*70] Standing

The American Forestry & Paper Association (AF&PA), a national trade association representing the forest, pulp, paperboard, and wood products industry, is one of the two Industry Petitioners asserting the remaining claims. n43 Before considering these challenges, however, we consider whether AF&PA has standing to raise them.

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n43 The Municipal Petitioners join in asserting the "regulatory basis" claim at Part II(F)(1).

-----End Footnotes-----

EPA argues that AF&PA lacks standing because it cannot show that it represents entities that suffer a cognizable injury under the Phase II Rule as promulgated. EPA argues that the interests of AF&PA entities might have supported standing had EPA decided to regulate forest roads as Phase II stormwater dischargers, but since EPA declined to do so, none of AF&PA's members are currently subject to the Rule. AF&PA contends that its members have a cognizable legal interest in the Rule because they risk becoming subject to regulation at any future time under the continuing designation authority. [*71]

We agree that AF&PA lacks standing. [HN15] A claimant meeting *Article III* standing requirements must show that "(1) it has suffered an 'injury in fact' . . . ; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 180-81, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000). Standing requires an injury that is "actual or imminent, not 'conjectural or hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S.

555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). AF&PA's interest in avoiding future regulation of forest roads is not actually or imminently threatened by any potential result in this case. No ripe claim about misuse of the residual authority to regulate forest road discharge, or any other kind of discharge, is before the court. Should members of AF&PA become subject to Phase II regulation through subsequent administrative action, it will have standing to challenge those actions at that time. In the meanwhile, we proceed to the merits of the remaining claims[*72] on behalf of AF&PA's co-petitioner, the National Association of Home Builders, which has established its standing to raise them.

E. Consultation with State and Local Officials

The Industry Petitioners contend that EPA failed to consult with the States on the Phase II Rule as required by § 402(p)(5), which instructs EPA to conduct studies "in consultation with the States," and § 402(p)(6), which instructs the Administrator to issue regulations based on these studies "in consultation with State and local officials." 33 U.S.C. §§ 1342(p)(5)-(6). We conclude that EPA satisfied its statutory duty of consultation. See *Marsh*, 490 U.S. at 378.

Petitioners concede several instances in which EPA circulated drafts of the Phase II Rule to state and local authorities, but argue that these consultations were meaningless because (1) the reports were circulated too far in advance of the actual rulemaking, (2) the rulemaking wrongfully proceeded based on other sources of input, (3) standard APA notice and comment procedures could not suffice because Congress must have intended something more when it added the consultation requirements to the language[*73] of § 402, and (4) consultation at the final stage of rulemaking was inadequate because comment was sought on the final report only after it had been submitted to Congress and the Phase II Rule had been promulgated. Petitioners provide examples of state feedback that allegedly went unheeded by EPA in its promulgation of the final Rule.

EPA maintains that it consulted extensively with States and localities in developing the Phase II Rule, discharging its obligations under §§ 402(p)(5) & (6). EPA contends that the comments Petitioners cite as unheeded by EPA demonstrate that EPA did consult with States concerning the Rule, even if some States did not concur in EPA's ultimate conclusion, and that the final rule adopted a good measure of the flexibility sought by state representatives. EPA argues that Industry Petitioners cannot complain that consultation was inadequate simply because it did not result in the adoption of Petitioners' preferred views.

EPA also disputes Petitioners' allegation that while EPA did comply with the terms of the 1999 Appropriations Act (requiring EPA to defend the proposed Phase II Rule before Congress and then publish the final report for public comment), [*74]it demonstrated its failure to adequately consult by publishing the report for public comment after the Phase II Rule had been formally promulgated, rendering any subsequent public comment meaningless. EPA counters that these actions do not indicate that it failed to satisfy Congress's directive that it consult with state and local officials, because EPA had engaged in extensive consultation before Congress requested the Appropriations Act report, and Congress did not require further consultation when it conditioned promulgation of the Rule only on the submission of this final report. EPA claims that while Congress required it to publish the report after its submission, public comment on the report was not required before promulgation, and that the statutory deadline structure rendered any other interpretation impossible.

We conclude that the overall record indicates EPA met its statutory duty of consultation. A draft of the first report was circulated to States, EPA regional offices, the Association of State and Interstate Water Pollution Control Administrators ("ASIWPCA"), and other stakeholders in November, 1993, and was revised based on comments received. EPA established the[*75] Urban Wet Weather Flows Federal Advisory Committee ("FACA Committee"), balancing membership between EPA's various outside stakeholder interests, including representatives from States, municipalities, Tribes, commercial and industrial sectors, agriculture, and environmental and public interest groups. 64 Fed. Reg. 68,724. The 32 members of the Phase II FACA Subcommittee, reflecting the same balance of interests, met fourteen times over three years and state and municipal representatives provided substantial input regarding the draft reports, the ultimate Phase II Rule, and the supporting data. n44 Id. EPA instituted the Phase II Subcommittee meetings in addition to the standard APA notice and comment procedures, which EPA also followed.

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n44 NRDC argues that this claim is not only meritless for the reasons stated by EPA, but also frivolous, since industry petitioner National Association of Home Builders, as a member of the FACA Phase II Subcommittee, participated in and affirmed that such consultation took place.

proposed to regulate all sites disturbing more than one acre).

-----End Footnotes-----

[*76]

The fact that the Rule did not conform to Petitioners' hopes and expectations does not bear on whether EPA adequately consulted state and local officials. Although required to consult with States and localities, EPA was free to chart the substantive course it saw fit. EPA was not required to consult with States on the Appropriations Act report. Even if EPA should have sought further comment at that late stage, failure to do so does not outweigh the evidence demonstrating extensive consultation and cooperation with local authorities on development of the Rule.

F. Designation of Certain Small MS4s and Construction Sites

The Industry Petitioners contend that, in designating certain small MS4s and construction sites for regulation under the Phase II Rule, EPA failed to adhere to the statutorily required regulatory basis and misinterpreted record evidence. We disagree.

1. Regulatory Basis

The Industry Petitioners and the Municipal Petitioners contend that EPA violated the statutory command to base the Phase II regulations on § 402(p)(5) studies. We review EPA's interpretation of its statutory authority under the Chevron standard, 467 U.S. at 842-44,[*77] and affirm.

Petitioners argue that the studies mandated by § 402(p)(5) were intended to provide the sole substantive basis for the "comprehensive program" envisioned in § 402(p)(6), but that EPA also (and thus improperly) based its designation of small MS4s and construction sites on (1) public comment received in the aftermath of judicial invalidation of the scope of construction sites regulated by the Phase I Rule, n45 and (2) additional research discussed in the Preamble to the Phase II Rule. n46

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n45 See *NRDC*, 966 F.2d at 1306 (remanding EPA's decision to regulate only construction sites disturbing more than five acres, after EPA had initially

n46 The Industry Petitioners contend that EPA lacked authority to issue the Phase II regulation of construction sites based on a process EPA itself characterized as "separate and distinct" from the development of the Report to Congress. 64 Fed. Reg. at 68,732. They add that the Phase II Rule was not "based on" the 1999 Report ultimately requested by Congress in the Appropriations Act, since EPA's report in response was released on the very day that the final Phase II Rule was published.

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[*78]

EPA contends that the statute did not require it to base its designations exclusively on the § 402(p)(5) studies, and that it was in fact required to take account of information from other sources in promulgating the regulations. It argues that it based the Phase II Rule on conclusions reported in the § 402(p)(5) studies, but then appropriately supported these results with data described in the additional study requested by Congress in the Appropriations Act, comments submitted during the statutorily required notice-and-comment process, and other available information. To read the authorizing statute as limiting reliance to the § 402(p)(5) studies, EPA claims, would preclude it from relying on recommendations received through the separate, post-study requirement to "consult with State and local officials" under § 402(p)(6), and through the notice and comment process mandated by the APA, 5 U.S.C. § 553(b).

Respondent-intervenor NRDC adds that the Phase II Rule is consistent with the § 402(p)(5) studies reported in 1995, and moreover, that the Industry Petitioners lack standing to raise the "regulatory basis" claim because they cannot show the requisite[*79] injury. See *Friends of the Earth*, 528 U.S. at 180-81.

a. Standing. Industry Petitioners n47 contend that they have suffered injury in fact, because their members are now either automatically regulated by the permitting requirements or subject to future regulation (under the residual authority, discussed below) that otherwise would not have been authorized, and that this is a direct result

of EPA's failure to adhere to the framework of the 1995 Report, which allegedly would have precluded these aspects of the Rule. NRDC contends that the Industry Petitioners lack standing because they cannot show that being subject to NPDES permitting is the causal result of the procedural injury they urge, and because they cannot base standing on hypothetical injury that may arise in the future.

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n47 Since we have already determined that AF&PA lacks standing to raise any of its claims, see Section D above, this discussion pertains to the remaining Industry Petitioner, National Association of Home Builders.

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[*80]

NRDC argues that the injuries Petitioners allege are not consistent with the guidelines laid out in *Friends of the Earth*. 528 U.S. at 180-81. It insists that Petitioners' only possible claims of injury from the alleged "regulatory basis" violation are purported harm to members caused by the final Phase II Rule itself or harm to members caused by EPA's alleged failure to provide adequate notice of future regulatory requirements in the 1995 Report. However, NRDC contends that Petitioners have not suffered the requisite injury, because they had actual notice that EPA might regulate small construction sites, 63 Fed. Reg. at 1583, and they can show no chain of causation linking their alleged injury from the Rule itself to the actions challenged here.

NRDC's causation argument is complex. Although the Petitioners purport to challenge EPA's failure to follow all of the 1995 Report's recommendations in the final Phase II Rule, NRDC contends, they are really challenging the subsequent proceedings through which EPA developed the final Rule. Even if there were some unlawful variance between the 1995 report and final rule, NRDC continues, the cause of that variance[*81] would have been some failure to abide by rulemaking standards during administrative proceedings that produced the text of the final Rule -- not EPA's attention to sources of input other than the 1995 Report. NRDC maintains that these intervening acts of rulemaking (e.g., Phase II Subcommittee activities and the notice-and-comment

process) break the requisite chain of causation between EPA's alleged failure to adhere to recommendations in the 1995 report and the flaws Petitioners allege in the Phase II Rule, which NRDC claims would have been due to "purportedly unlawful EPA decisions on the merits during the subsequent administrative proceedings." See *Northside Sanitary Landfill v. Thomas*, 804 F.2d 371, 381-84 (7th Cir. 1986) (finding no standing to challenge EPA statements concerning the fate of a hazardous waste facility when subsequent state administrative acts, not EPA comments, would determine the facility's actual fate).

We note that NRDC's standing arguments apply equally to the Municipal Petitioners, who can also assert only the harms resulting to members from the Rule itself or from a lack of notice, and that we are thus not only considering the standing of[*82] the Industry Petitioners but also that of the Municipal Petitioners to raise the "regulatory basis" claim. n48 That established, we find standing for both.

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n48 Although the issue of Municipal Petitioners' standing has not been raised by the parties, we are obliged to consider it to determine whether the case-or-controversy requirement of Article III is satisfied. See, e.g., *Boeing Co. v. Van Gemert*, 444 U.S. 472, 488 n.4, 62 L. Ed. 2d 676, 100 S. Ct. 745 (1980); *Juidice v. Vail*, 430 U.S. 327, 331, 51 L. Ed. 2d 376, 97 S. Ct. 1211 (1977).

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NRDC essentially argues that petitioners lack standing because (1) they cannot show that being subject to NPDES permitting is the causal result of the procedural injury they urge, (2) they cannot claim any actual notice injury from the alleged procedural wrong because notice was actually given, and (3) they cannot claim standing based on hypothetical injury that may (or may not) arise from future regulation under the residual authority. [*83] We can readily agree with the latter two contentions. As discussed above, the "actual injury" requirement of *Article III* standing precludes judicial consideration of exactly the kind of hypothetical harm the Industry Petitioners allege may follow from use of Phase II

authority for future designations of regional sources. *Friends of the Earth*, 528 U.S. at 180-81. If future Phase II designations cause identifiable injury to Petitioners, they will then be free to pursue that ripe claim. And because EPA clearly issued notice to all regulated parties that they may be subject to regulation under the proposed rule, 63 Fed. Reg. at 1568 (MS4s) and 1582 (construction), petitioners cannot show injury from lack of actual notice.

However, NRDC's causation argument is less persuasive. NRDC correctly argues that the petitioners cannot establish a definite chain of causation between the EPA's alleged failure to limit their regulatory basis to the § 402(p)(5) studies and the fact that they now must obtain permits. But this will almost always be true of petitions challenging an agency's failure to abide by statutory procedural requirements. Because all administrative[*84] decisionmaking following an alleged procedural irregularity could always be considered an intervening factor breaking the chain of causation, NRDC's interpretation of the requisite chain of causation would dubiously shield administrative decisions from procedural review.

For this reason, we have held that [HN16] the failure of an administrative agency to comply with procedural requirements in itself establishes sufficient injury to confer standing, even though the administrative result might have been the same had proper procedure been followed. *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975) (agency's failure to comply with *Nat'l Env'tl. Policy Act's* procedural requirements constituted injury sufficient to support standing of a geographically related plaintiff regardless of potentially similar regulatory outcome). In *City of Davis*, we noted that the standing inquiry represents "a broad test, but because the nature and scope of environmental consequences are often highly uncertain before study we think it an appropriate test." *Id.* [HN17] A plaintiff who shows that a causal relation is "probable" has standing, even if the chain cannot be definitively[*85] established. *Johnson v. Stuart*, 702 F.2d 193, 195-96 (9th Cir. 1983) (school students and their parents had standing to challenge a statute that limited the texts that might be selected for teaching, even though it could not be shown whether any specific book had been rejected under this statute or for other reasons).

The Supreme Court has also acknowledged that standing may be established by harm resulting indirectly from the challenged acts, *Warth v. Seldin*, 422 U.S. 490, 504-05, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975), and that causation may be established if the plaintiff shows a good probability that, absent the challenged action, the alleged harm would not have occurred, *Arlington*

Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 262-64, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977).

Thus, although the petitioners cannot show with certainty that the alleged "regulatory basis" violation caused them to be wrongfully subjected to Phase II permitting requirements, we hold that they have alleged a procedural injury sufficient to support their standing to bring the claim.

b. Merits. Although we resolve the standing issue in favor[*86] of the petitioners, we nevertheless affirm the Rule against their claim that EPA violated procedural constraints implied by the authorizing statute, § 402(p)(6).

Congress intended EPA to use all sources of information in developing a comprehensive program to protect water quality to the maximum extent practicable. The statute unambiguously required EPA to base its regulations both on the § 402(p)(5) studies and on consultation with state and local officials. Congress enacted § 402 with full knowledge that EPA would also be required to take account of public comments during the notice and comment phase of administrative rulemaking prescribed by the APA. n49

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n49 Even if the statute were ambiguous, we would defer to EPA's reasonable interpretation. *Chevron*, 467 U.S. 843-44, 81 L. Ed. 2d 694, 104 S. Ct. 2778.

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2. MS4s in Urbanized Areas

The Municipal Petitioners contend that the designation of small MS4s for Phase II regulation according to Census-Bureau defined areas of population [*87]density ("urbanized areas") is arbitrary and capricious. They argue that EPA has not established that the Census Bureau's designation of urbanized areas is correlated with actual levels of pollution runoff in stormwater, and that EPA adopted the designations simply for administrative convenience. We affirm, because the record reflects a reasoned basis for EPA's decision. See *Marsh*, 490 U.S. at 378.

Conceding that the Preamble cites studies purporting to establish "a high correlation between the degree of development/urbanization and adverse impacts on receiving waters due to stormwater," 64 Fed. Reg. at 68,751, the Municipal Petitioners nevertheless contend that the record contains no "demonstrably correlated, quantified basis on which EPA may reasonably have concluded that any particular population, or any population density, per se establishes that all urban areas having that same characteristic in gross are necessarily appropriate for inclusion as Phase II sources." Pointing to *Leather Indus. of Am. v. EPA*, 309 U.S. App. D.C. 136, 40 F.3d 392, 401 (D.C. Cir. 1994) (rejecting as arbitrary EPA's regulation of pollutant[*88] levels in the absence of data supporting a relationship between the caps and level of risk), Petitioners argue that EPA simply assumed the relationship Congress contemplated it would establish by the § 402(p)(5) studies.

EPA responds that it extensively documented the relationship between urbanization and harmful water quality impacts from stormwater runoff, pointing to its findings that the degree of surface imperviousness in an area directly corresponds to the degree of harmful downstream pollution from stormwater runoff, 64 Fed. Reg. at 68,724-27, and that it articulated a rational connection between these record facts and its decision to designate small MS4s serving areas of high population density ("urbanized areas") to protect water quality.

We treat EPA's decision with great deference because we are reviewing the agency's technical analysis and judgments, based on an evaluation of complex scientific data within the agency's technical expertise. See *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103, 76 L. Ed. 2d 437, 103 S. Ct. 2246 (1983); see also *Chem. Mfrs. Ass'n v. EPA*, 287 U.S. App. D.C. 49, 919 F.2d 158, 167 (D.C. Cir. 1990)[*89] ("It is not the role of courts to 'second-guess the scientific judgments of the EPA"). We conclude that the record supports EPA's choice.

The statute simply called upon EPA to "designate stormwater discharges," other than those designated in Phase I, "to be regulated to protect water quality." 33 U.S.C. § 1342(p)(6). EPA did so, based on record evidence showing a compelling and widespread correlation between urban stormwater runoff and deleterious impacts on water quality. Petitioners' assertion that EPA failed to establish a "quantified" basis for its designation is inapposite. The statute did not require EPA to establish with pinpoint precision a numeric population threshold within urbanized areas that would justify regulation under Phase II. In areas implicating technical expertise and judgment, courts do not require "perfect studies" or data. *Sierra Club*, 167

F.3d at 662. EPA satisfied the *Leather Industries* standard by adopting a threshold consistent with the criterion of "protecting water quality," and did not assume, but instead sufficiently documented, the relationship between urbanization and harmful stormwater discharge. [*90]

3. Small Construction Sites

Industry and Municipal Petitioners also argue that EPA's decision to regulate under Phase II all construction sites disturbing between one and five acres of land ("small construction sites") is arbitrary and unsupported by the record. We do not agree. See *Marsh*, 490 U.S. at 378.

a. Record Evidence. Municipal Petitioners claim that EPA arrived at the one-acre standard based not on factual findings in the record but instead as a reaction to the earlier Ninth Circuit remand of the Phase I five-acre designation. They allege that the one-acre standard is no more based on supporting data than the rejected five-acre standard, and is thus quantitatively arbitrary.

Industry Petitioners argue that EPA's findings do not support regulation of all small construction sites, but indicate only that small construction sites, taken cumulatively, may cause effects similar to large sites in a given area. They contend that EPA's conclusion that adverse effects are possible under certain circumstances cannot support categorical designation of all small construction sites nationwide, and that the Rule is arbitrary because (1) it is [*91]based on an analysis that fails to take account of the frequency of negative impacts, (2) it fails to take account of acknowledged factors that determine whether small construction activities cumulatively cause harm (such as the degree of development in a watershed at any given time), and (3) EPA has acknowledged that the actual water quality impact of construction sites of all sizes varies widely from area to area depending on climatological, geological, geographical, and hydrological influences. n50

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n50 The Industrial Petitioners argue that although the Phase I authorizing statute required EPA to regulate all sources associated with "industrial activity," Congress expressly directed that the Phase II regulatory program be focused on sources that require regulation "to protect water quality." They assert that because EPA's rule ignores the variability

of water quality impacts nationwide, the Rule is not appropriately targeted on the protection of water quality.

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Industry Petitioners further contend that the[*92] record does not support the designation of small sites, because almost all of the technical papers EPA relied on focused on larger sites or failed to take account of size, n51 and because the lack of an adequate factual basis for nationwide regulation of small sites makes the Phase II Rule arbitrary and capricious. *API v. EPA*, 342 U.S. App. D.C. 159, 216 F.3d 50, 58 (D.C. Cir. 2000) (invalidating a solid waste rule because EPA "failed to provide a rational explanation for its decision" declining to exclude oil-bearing waste waters from the statutory definition of solid waste).

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n51 Petitioners heavily critique two studies relied on by EPA that dealt specifically with the water quality impacts of small construction sites, noting that one concludes it is impossible to generalize about the impacts of small sites, Lee H. MacDonald, Technical Justification for Regulating Construction Sites 1-5 Acres in Size, July 22, 1997, and that the other merely concludes that small sites "can have" significant effects if erosion controls are not implemented, David W. Owens, et al., Soil Erosion from Small Construction Sites. Petitioners contend that the latter study was managed with no erosion controls, intentionally producing worst-case sediment runoff and unreasonable estimates of actual sediment yields for small sites nationwide. EPA vigorously defends the studies.

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[*93]

EPA maintains that construction sites regulated under the Phase II Rule degrade water quality across the United States and that the administrative record unambiguously

documents that harm. EPA disputes Petitioners' assertion that it failed to establish the need to regulate small sites nationwide, but also contends that it is not required to base every administrative decision on a precise quantitative analysis. See *Sierra Club*, 167 F.3d at 662 ("EPA typically has wide latitude in determining the extent of data-gathering necessary to solve a problem.").

EPA also disputes petitioners' assertions that data from studies involving larger construction sites are irrelevant to the Phase II Rule. EPA explains that discharges of sediment due to erosion are the result of the interaction of several factors including soils, slope, precipitation, and vegetation:

For construction sites that are one acre or more, none of the environmental factors contributing to sediment discharges is dependent on the size of the site disturbed. A one-acre site can have the same combination of soils, slope, degree of disturbance and precipitation as a 100-acre site, and consequently can [*94]lose soil at the same rate . . . and discharge sediments in the same concentrations . . . as a 100-acre site.

EPA contends that it is thus reasonable to extrapolate data about small sites from studies of larger ones -- and that such an extrapolation may even be forgiving, since small sites are currently less likely to have effective erosion and sedimentation control plans. n52

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n52 NRDC adds that notwithstanding the clear interest of the National Association of Home Builders ("NAHB," one of the Industry Petitioners), NAHB's multi-year participation in the FACA Phase II Subcommittee Small Construction and No-Exposure Sites Work Group, and NAHB's own submission of detailed comments on the proposed Rule, NAHB failed to enter into the administrative record any study contradicting the proposition that small construction sites cause water quality problems. NRDC points to the record's showing that NAHB had itself proposed that regulation of construction sites of two acres or greater was appropriate, and contends that this is thus not a dispute over whether small construction sites should be regulated on a nationwide basis, but instead a technical disagreement over whether EPA should establish a one-acre threshold or a different threshold on a similar small scale.

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[*95]

Indeed, EPA argues that although adverse water quality impacts of small construction sites have been widely recognized, effective local erosion and sedimentation control programs have not been adopted in many areas. n53 Though not all watersheds are currently adversely effected by small construction sites, n54 EPA notes that the Phase II Rule acts "to protect water quality" both remedially and preventively, and argues that it need not quantify the cumulative effects of discharges from these sites or identify all watersheds that are currently harmed before acting to limit pollution from small sites. n55

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n53 Whitney Brown and Deborah Caraco, Controlling Stormwater Runoff Discharges from Small Construction Sites: A National Review, Task 5 Final Report submitted by the Center for Watershed Protection to the EPA Office of Wastewater Management, March 1997, IP E.R. 633, 643.

n54 EPA adds that operators of small sites in areas unlikely to suffer adverse impacts may apply for a permit waiver if little or no rainfall is expected during the period of construction (the "rainfall erosivity waiver") or if regulation is unnecessary based on a location-specific evaluation of water quality (the "water quality waiver"). 64 Fed. Reg. at 68,776.

[*96]

n55 EPA also implies permission to regulate for potential cumulative impacts of small sites from the past directive of this court. When the Phase I industrial discharge regulations were challenged, we found no record data to support that rule's exemption of construction activities on less than five acres and held that small sites did not categorically qualify for a de minimis exemption because "even small construction sites can have a significant impact on local water quality." *NRDC*, 966 F.2d at 1306.

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[HN18] We reverse under the arbitrary and capricious standard only if the agency has relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision contrary to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Petitioners' contention that EPA relied on factors Congress did not intend it to consider was rejected[*97] in our earlier discussion of the regulatory basis challenge. They submit no evidence that EPA failed to consider an important aspect of the problem. We cannot say that EPA's designation of small construction sites is implausible (especially given the support of twenty-some-odd studies of sedimentation from construction sites that EPA reviewed in promulgating the challenged regulations, 64 Fed. Reg. 68,728-31). We could remand this aspect of the Rule only if, as the petitioners urge, EPA's explanation for its decision to regulate small construction sites were contrary to the record evidence, and it is not.

Petitioners' primary contention is that evidence in the record suggests it is not possible to provide an explicit, quantitative link between small construction sites and an adverse effect on water quality. But even if this were so, EPA's decision to regulate preventively small construction sites "to protect water quality" is not inconsistent with the record. Petitioners contend that EPA's reliance on data from studies of large construction sites is insufficient to support EPA's designation of small sites, but EPA has adequately supported its contention that experts can[*98] reasonably extrapolate projected water quality impacts from large to small sites. [HN19] We apply the substantial evidence standard when reviewing the factual findings of an agency, *Dickinson v. Zurko*, 527 U.S. 150, 156-58, 144 L. Ed. 2d 143, 119 S. Ct. 1816 (1999), n56 and find it satisfied here.

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n56 The "substantial evidence" standard requires a showing of such relevant evidence as a reasonable mind might accept as adequate to support a

conclusion. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

because the record demonstrates that the presumed fact of the water quality impact of small sites is more likely true than not.

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Moreover, EPA is not required to conduct the "perfect study." *Sierra Club*, 167 F.3d at 662. We defer to an agency decision not to invest the resources necessary to conduct the perfect study, and we defer to a decision to use available data unless there is no rational relationship between the means EPA uses to account for any imperfections in its data and the situation to which those means are applied. *Id.*; *Am. Iron & Steel Inst. v. EPA*, 325 U.S. App. D.C. 76, 115 F.3d 979, 1004 (D.C. Cir. 1997).[*99] The record indicates a reasoned basis for EPA's decision that regulating small construction sites was necessary "to protect water quality" as required by § 402(p)(6).

b. Waivers. Industry Petitioners further contend that EPA's allowance of regulatory waivers for small construction sites not likely to cause adverse water quality impacts inappropriately supplements the permitting regulations.

Petitioners argue that EPA has the burden of establishing a comprehensive program to control sources as necessary to protect water quality, and that shifting the burden to individual contractors, businesses, and homeowners to prove they do not harm water quality falls short of meeting this statutory obligation. Citing *Nat'l Mining Ass'n v. Babbitt*, 335 U.S. App. D.C. 305, 172 F.3d 906, 910 (D.C. Cir. 1999), they argue that EPA's rebuttable regulatory presumption of water quality impact from small construction activity is unreasonable because the agency has established no scientific likelihood that any given small site will affect water quality. EPA defends the waiver approach as fair and efficient, and argues that the Industrial Petitioners are confusing arguments[*100] about the limits of presumptions in evidentiary hearings conducted under the APA. n57

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n57 EPA further argues that even if the waiver provision were properly characterized as an evidentiary presumption, it should be sustained

EPA is correct; the Phase II Rule creates no presumption applicable to an evidentiary hearing, and [HN20] a regulation creating exemptions by waiver is reviewed under the familiar arbitrary and capricious standard. The use of waivers to allow permit exemptions for small sites unlikely to cause adverse impacts is reasonable under that standard.

c. Consistency. Industry Petitioners also argue that EPA's decision to regulate all small construction sites under the Phase II Rule is arbitrary and capricious because EPA applied a different standard in regulating small construction projects than it applied to other potential sources of stormwater runoff subject to[*101] Phase II regulation.

Petitioners contend that EPA decided not to designate other potential sources identified in the § 402(p)(5) studies because it determined that there are not "sufficient data . . . available at this time on which to make a determination of potential adverse water quality impacts for the category of sources." 64 Fed. Reg. at 68,780. Petitioners contend this standard should have been applied to small construction sites as well, but EPA opted to regulate these sources despite an alleged lack of coherent data on small site impacts as a general category.

EPA counters, once again, that it did have adequate data to regulate small construction sites. It contends that construction sites of all sizes have greater erosion rates than almost any other land use, and thus are not similarly situated to the potential polluters that EPA chose not to regulate at this time. n58 These sources include secondary industrial activities (for example, maintenance of construction equipment or local trucking for an unregulated facility such as a grocery store) and other unregulated commercial activities (for example, car and truck rental facilities). 64 Fed. Reg. at 68,779. [*102]EPA reports that it decided not to categorically regulate these potential sources based both on available data about water quality impacts and on the extent to which potentially adverse water quality impacts are mitigated by existing regulations to which these sources are already subject. *Id.* at 68,780.

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n58 EPA notes that the Phase II Rule empowers regional permitting authorities to regulate local sources of these types known to be responsible for harmful water quality impacts via the continuing "residual designation" authority (an aspect of the Rule that Petitioners also challenge).

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We find no error. See *Marsh*, 490 U.S. at 378. EPA acted reasonably in designating all small construction sites for Phase II regulation, and Industry Petitioners point to no record evidence that the nature of pollutant contributions from small construction site discharge is sufficiently similar to pollutants from the non-regulated sources to support the analogy they seek to draw. *New Orleans Channel 20 v. FCC*, 265 U.S. App. D.C. 213, 830 F.2d 361, 366 (D.C. Cir. 1987)[*103] (an agency does not act irrationally when it treats parties differently, unless the parties are similarly situated). Sufficient evidence supports EPA's conclusion that small construction sites are not similar enough to these "other sources" to support petitioner's challenge.

G. Continuing ("Residual") Designation Authority

The Industry Petitioners argue that EPA acted improperly in retaining authority to designate future sources of stormwater pollution for Phase II regulation as needed to protect federal waters. We disagree.

The Phase II Rule preserves authority for EPA and authorized States to designate currently unregulated stormwater dischargers as requiring permits under the Rule if future circumstances indicate that they warrant regulation "to protect water quality" under the terms of § 402(p)(6). 40 C.F.R. § 122.26(a)(9). In the Phase II Preamble, EPA explains this aspect of the Rule:

Under today's rule, EPA and authorized States continue to exercise the authority to designate remaining unregulated discharges composed entirely of stormwater for regulation on a case-by-case basis. . . . Individual sources are subject to regulation[*104] if EPA or the State, as the case may be, determines that the stormwater discharge from the source contributes to a violation of a

water quality standard or is a significant contributor of pollutants to waters of the United States. This standard is based on the text of section CWA 402(p). In today's rule, EPA believes, as Congress did in drafting section CWA 402(p)(2)(E) , that individual instances of stormwater discharge might warrant special regulatory attention, but do not fall neatly into a discrete, predetermined category. Today's rule preserves the regulatory authority to subsequently address a source (or category of sources) of stormwater discharges of concern on a localized or regional basis.

64 Fed. Reg. 68,781. The text of the Rule requires a discharger to obtain a permit if the NPDES permit authority determines that "stormwater controls are needed for the discharge based on wasteload allocations that are part of 'total maximum daily loads' (TMDLs n59) that address the pollutant(s) of concern" or that "the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor[*105] of pollutants to waters of the United States." 40 C.F.R. §§ 122.26(a)(9)(i)(C)-(D).

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n59 TMDLs are pollutant loading limits established by NPDES permitting authorities under the *Clean Water Act* for waters that do not meet a water quality standard due to the presence of a pollutant. See 33 U.S.C. § 1313(d).

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1. Statutory Authority

The Industry Petitioners contend that this "residual" designation authority, which would allow a NPDES permitting authority to require at any future time a permit from any stormwater discharge not already regulated, is ultra vires. Although they concede that Congress authorized case-by-case designation in § 402(p)(2)(E), n60 they argue that this authority attached only during the permitting moratorium that ended in 1994, prior to the Phase II rulemaking. They object that EPA has impermissibly designated a category of "not yet identified" sources and preserved authority to regulate

them on a case-by-case basis indefinitely[*106] into the future. n61

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n60 This section enables a NPDES permitting authority to designate for regulation: "[a] discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 33 U.S.C. § 1342(p)(2)(E).

n61 Notably, Industry Petitioner NAHB itself took the position during Phase II Subcommittee proceedings that the power to designate additional sources survived the promulgation of the Phase II Rule. In a 1996 comment letter to EPA, NAHB asserted its understanding that "the permitting authority still reserves the right to designate additional sources if they are shown to be a contributor of water quality impairment." NRDC Supplemental Excerpts of Record at 58.

-----End Footnotes-----

Petitioners contend that § 402(p)(6) n62 cannot rescue the residual authority because it does not authorize case-by-case identification of discharges [*107]to be regulated, and that Congress, had it intended otherwise, would have included language in § 402(p)(6) similar to the case-by-case authority explicitly granted in § 402(p)(2)(E). n63 They also contend that continuing authority to designate sources based on waste load allocations that are part of TMDLs exceeds the scope of authority in § 402(p)(2), which nowhere mentions TMDLs. Finally, they argue that the categorical designation authorized by § 402(p)(6) is only permissible when based on the § 402(p)(5) studies and carried out in consultation with state and local authorities, but that the Rule allows future designations based on agency discretion unaccompanied by adequate demonstration that the source itself is a significant threat to water quality.

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n62 The full text of § 402(p)(6), which specifically authorizes the Phase II program, reads: "Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under *paragraph* (5)) which designate stormwater discharges, other than those discharges described in *paragraph* (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate." 33 U.S.C. § 1342(p)(6).

[*108]

n63 Petitioners further argue that even if EPA could preserve the case-by-case authority conferred in § 402(p)(2)(E), that section confers authority only to regulate "a discharge" determined to threaten water quality, not a category of discharges. However, we agree with respondent-intervenor NRDC's argument that § 402(p)(2)(E) does not preclude EPA from designating entire categories of sources. Petitioners' argument follows from its reliance on the fact that § 402(p)(2)(E) refers to "discharge" in the singular rather than the plural to conclude that EPA may only designate sources meeting the § 402(p)(2)(E) description on a case-by-case basis. But all five of the § 402(p)(2)-(5) categories refer to "discharge" in the singular, even in reference to discharges clearly intended for categorical regulation, like "a discharge from a municipal separate storm sewer system serving a population of 250,000 or more." 33 U.S.C. § 1342(p)(2)(C). The error in petitioners' interpretation is exposed by 1 U.S.C. § 1, which provides that "in determining the meaning of any Act of Congress, unless the context indicates otherwise -- words importing the singular include and apply to several persons, parties, or things."

-----End Footnotes-----

EPA counters that § 402(p)(6) authorized the designation, made on the basis of statutorily required sources of input and in consultation with the States, of a third class of discharges to be identified on location-specific bases by the NPDES permitting authority. EPA contends that Petitioners mistake the source of its authority for continuing designations as arising only from § 402(p)(2), discounting the full scope of its authority under § 402(p)(6). EPA argues that it permissibly interpreted § 402(p)(6) as allowing the residual designation authority because its language does not expressly preclude it, and because such authority is consistent with (and arguably required by) that section's mandate to establish a "comprehensive program" to protect water quality from adverse stormwater discharges. EPA maintains that the structure of § 402(p) reflects "Congress' intent to assure regulation of all problematic stormwater discharges as expeditiously as reasonably possible -- not to limit EPA to a one-time-only opportunity to designate discharges for regulation."

We review EPA's interpretation of the statute it administers with deference, *Royal Foods Co.*, 252 F.3d at 1106, [*110] and affirm this aspect of the Phase II Rule as a legitimate exercise of regulatory authority conferred by § 402(p). The residual designation authority is grounded both on § 402(p)(6), which broadly authorizes a comprehensive program to protect water quality, and on § 402(p)(2)-(5), which authorizes case-by-case designation of certain polluters and categories of polluters.

While not a blank check, § 402(p)(6) authorizes a comprehensive program that allows regional designation of polluting discharges that compromise water quality locally, even if they have not been established as compromising water quality nationally at the time Phase II was promulgated. In allowing continuing designation authority, EPA permissibly designated a third category of dischargers subject to Phase II regulation -- those established locally as polluting U.S. waters -- following all required studies and consultation with state and local officials. EPA reasonably determined that discharges other than those from small MS4s and construction sites were likely to require regulation "to protect water quality" in satisfaction of the § 402(p)(6) mandate. EPA reasonably determined that, although it lacked sufficient[*111] data to support nationwide, categorical designation of these sources, particularized data might support their designations on a more localized basis. EPA reasonably interpreted § 402(p)(6) as authorizing regional designation of sources and regional source categories, based on water quality standards including TMDLs.

Petitioners' § 402(p)(2)-(5) argument (that EPA could not draw support for the residual designation authority from § 402(p)(2)-(5) because such authority expired in 1994) is contradicted by the plain language of the statute. Respondent-intervenor NRDC correctly notes that § 402(p)(1) sets forth a permitting moratorium for stormwater discharges prior to 1994, and that § 402(p)(2) exempts certain categories of sources from that permitting moratorium, including those to be regulated on a case-by-case basis under § 402(p)(2)-(5). Specifically, the statute provides that the 1994 date "shall not apply" to the five categories of discharges listed in § 402(p)(2). The termination of a moratorium that "shall not apply" to the continuing designation authority under § 402(p)(2)-(5) cannot rescind EPA's authority to regulate sources in that category. Nothing in § 402(p) suggests[*112] that authority to designate these sources ends at any time, and EPA remains free to designate § 402(p)(2)(E) dischargers.

Finally, although Petitioners may be legitimately concerned that a permitting authority may designate a source without adequately establishing its eligibility, this issue must be addressed in the context of an actual case or controversy. Whether a NPDES authority may impose permitting requirements on a discharger without an adequate finding of polluting activity is not yet ripe for judicial review. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1141 (9th Cir. 2000) ("A concrete factual situation is necessary to delineate the boundaries of what conduct the government may or may not regulate.").

2. Nondelegation Doctrine

Industry Petitioners contend that EPA's interpretation of § 402(p) to allow the residual designation authority must be rejected because it would render the statute unconstitutional under the nondelegation doctrine. We deny petitioners' claim, both because it is not properly raised and because it rests on an interpretation explicitly overturned by the United States Supreme Court.

Petitioners base their contention[*113] on *Am. Trucking Ass'ns v. EPA*, 336 U.S. App. D.C. 16, 175 F.3d 1027, 1034 (D.C. Cir. 1999), n64 in which the D.C. Circuit remanded a regulation under the non-delegation doctrine because, although EPA had applied reasonable factors in establishing the air quality standards in question, the agency had articulated no "intelligible principle" to channel its application of these factors. *Id.* Petitioners argue that if § 402(p) authorizes a NPDES permitting authority to require Phase II permitting of any stormwater source deemed to be a "significant contributor" of pollutants to U.S. waters, then that grant

of authority likewise constitutes an unconstitutional delegation of legislative authority because -- as did the American Trucking delegation -- it "leaves [EPA] free to pick any point" at which a regulatory burden will attach. *Id.* at 1037.

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n64 This case was reversed in relevant part by the Supreme Court in *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 476, 149 L. Ed. 2d 1, 121 S. Ct. 903 (2000).

-----End Footnotes-----

[*114]

However, in reversing *American Trucking*, the Supreme Court rejected the notion that an agency has the power to interpret a statute so as to either save it from being, or transform it into, an unconstitutional delegation. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473, 149 L. Ed. 2d 1, 121 S. Ct. 903 (2000). [HN21] Whether a statute delegates legislative power "is a question for the courts, and an agency's [interpretation] has no bearing upon the answer." *Id.* Petitioner's argument to the contrary rests on the very reasoning in *American Trucking* that was overturned in *Whitman*. The relevant question is not whether EPA's interpretation is unconstitutional, but whether the statute itself is unconstitutional -- a challenge Industry Petitioners do not raise.

But even if the challenge were properly raised, § 402(p) would, like the *Clean Air Act* standard-setting provision at issue in *Whitman*, survive constitutional review. The Supreme Court has upheld against nondelegation attacks many similar statutes establishing nonquantitative standards. *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104, 91 L. Ed. 103, 67 S. Ct. 133 (1946) (upholding[*115] statute giving SEC authority to modify corporate structures so that they are not "unduly or unnecessarily complicated" and do not "unfairly or inequitably distribute voting power among security holders"); *Yakus v. United States*, 321 U.S. 414, 419-20, 423-27, 88 L. Ed. 834, 64 S. Ct. 660 (1944) (upholding statute giving agency power to set prices that "will be generally fair and equitable"). In *Yakus*, the Court held that a statutory command to "effectuate the purposes" of the overall statutory scheme withstood scrutiny. *Id.*

Section 402(p)(6)'s directive "to protect water quality" summarizes the central purpose of the *Clean Water Act* "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a). It establishes a determinate criterion of the kind the Supreme Court upheld in *Yakus* and *American Power & Light*.

3. Notice and Comment

Industry Petitioners also contend that, to the extent it allows the designation of entire categories of sources, rather than individual sources, the residual designation authority violates the APA, 5 U.S.C. § 553(b)(3),[*116] because EPA did not provide public notice that it was considering such a rule. *Ober v. EPA*, 84 F.3d 304, 315 (9th Cir. 1996) (invalidating EPA rule where it deviated from proposal); *Shell Oil Co. v. EPA*, 292 U.S. App. D.C. 332, 950 F.2d 741, 746-47 (D.C. Cir. 1991). Petitioners contend that while the proposed rule would have allowed case-by-case designation where an authority "determines that the discharge contributes to a violation," 63 Fed. Reg. at 1635 (proposing 40 C.F.R. § 122.26(a)(9)(i)(D)), the final rule authorizes case-by-case designation where "the discharge, or category of discharges within a geographic area, contributes to a violation," 40 C.F.R. § 122.26(a)(9)(i)(D).

EPA notes that it had proposed to promulgate continuing designation authority in some form, and points to elements in the proposed rule that explicitly envision the categorical designation of sources at the local/watershed level. n65

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N65 "Today's proposal would encourage [voluntary] control of stormwater discharges . . . unless the discharge (or category of discharges) is individually or locally designated as described in the following section. The necessary data to support designation could be available on a local, regional, or watershed basis and would allow the NPDES permitting authority to designate a category of sources or individual sources on a case-by-case basis. If sufficient nationwide data [becomes] available in the future, EPA could at that time designate additional categories of industrial or commercial sources on a national basis. EPA requests comment on the three-pronged analysis used to assess the need to designate additional industrial or commercial sources and invites suggestions regarding watershed-based designation." 63 Fed. Reg. at 1588 .

15 (RFA[*119] was violated where improper definition of small entity excluded analysis of affected entities).

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[*117]

[HN22] According to the "logical outgrowth" standard, a final regulation must be "in character with the original proposal and a logical outgrowth of the notice and comments." *Hodge*, 107 F.3d at 712. EPA emphasized that it was considering continuing designations based on watershed data rather than designating these sources on a national basis, and invited comment regarding this proposal. 63 Fed. Reg. at 1536. This supports the necessary relationship between the proposed and final rule.

H. Regulatory Flexibility Act

The Industry Petitioners contend that the Phase II Rule will impose substantial compliance costs on their members and other small entities, but that EPA failed to conduct the analysis required by the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601-11. They argue that EPA seeks to excuse its noncompliance by falsely certifying that the Rule does not have a significant impact on a substantial number of small entities. 64 Fed. Reg. at 68,800. We are not persuaded.

[HN23] The RFA requires a federal agency to prepare a regulatory flexibility analysis and an assessment of the economic impact of a proposed rule[*118] on small business entities, 5 U.S.C. § 604, unless the agency certifies that the proposed rule will not have a "significant economic impact on a substantial number of small entities" and provides a factual basis for that certification, id. at § 605; *Northwest Mining Ass'n v. Babbitt*, 5 F. Supp. 2d 9, 15-16 (D.D.C. 1998).

EPA did certify that the Phase II Rule would not yield "significant impacts," 64 Fed. Reg. at 68,800, but Petitioners contend this certification is erroneous because (1) EPA treats as "not significant" costs that are in fact significant, and (2) EPA failed to account for the entire universe of small entities affected (including small home construction contractors) and all significant costs to those entities. They urge that the failure to consider a significant segment of the affected small entity community requires invalidation of the Rule, citing *N.C. Fisheries Ass'n v. Daley*, 27 F. Supp. 2d 650, 659 (E.D. Va. 1998) (certification failed to comply with RFA where agency ignored several categories of affected small entities), and *Northwest Mining*, 5 F. Supp. 2d at

EPA maintains that its certification was appropriate, and, moreover, that it has already voluntarily followed the additional RFA procedures that the Industry Petitioners now request. EPA argues that Petitioners have incorrectly specified the costs that the small entities they represent will bear, referring erroneously to EPA's total annual compliance costs estimates for all entities, rather than to costs estimated for small entities as defined under the RFA. EPA maintains that it did consider economic impacts on small home construction contractors who might be denied discharge permits, and that it evaluated the annual costs of Phase II compliance associated with any land disturbance between one and five acres. 64 Fed. Reg. at 68,800-01.

Respondent-intervenor NRDC contends that Petitioners' reliance on measures of the aggregate impact of the Rule on small entities to determine compliance with the threshold test under the RFA fails as a matter of law because aggregate measures are not consistent with the statutory language setting out that test. NRDC notes that [HN24] the plain language[*120] of § 605(b) sets out a three-component test indicating that EPA need not perform a regulatory flexibility analysis if it finds that the proposed rule will not have: (1) "a significant economic impact" on (2) "a substantial number" of (3) "small entities." 5 U.S.C. § 605(b). NRDC contends that EPA satisfied the statutory test, and that Petitioners' interpretation, which rewrites the test to omit the "substantial number" component, is erroneous.

We believe NRDC correctly interprets the statute, *Marsh*, 490 U.S. at 378, and that EPA reasonably certified that the Phase II Rule would not have a significant economic impact in compliance with the *Regulatory Flexibility Act*. We also conclude that, even if EPA had failed to properly comply with the procedural requirements of the RFA, its actual assessment of the Rule's economic impacts renders any defective compliance harmless error. [HN25] In granting relief under RFA § 611, a court may order an agency "to take corrective action consistent with" the RFA and APA, including remand to the agency, 5 U.S.C. § 611(a)(4)(A), but EPA has already conducted the economic analyses Petitioners seek[*121] when it convened the "Small Business Advocacy Review Panel" before publishing notice of the proposed rule. 64 Fed. Reg. at 68,801. That Panel evaluated the Rule and considered the comments of small entities on a number of issues, consistent with the procedures described in RFA § 603. Id. Appendix 5 of EPA's preamble to the proposed rule explained provisions that had been designed to minimize impacts on small entities, based on advice and recommendations

from the Panel. 63 Fed. Reg. 1615, 64 Fed. Reg. 68,811. Modifications for small entities included alternative compliance and reporting mechanisms responsive to the resources of small entities, simplified procedures, performance rather than design standards, and waivers.

Any hypothetical noncompliance would thus have been harmless, since the available remedy would simply require performance of the economic assessments that EPA actually made. Like the Notice and Comment process required in administrative rulemaking by the APA, the analyses required by RFA are essentially procedural hurdles; after considering the relevant impacts and alternatives, an administrative agency remains free to regulate as it sees [*122]fit. We affirm the Rule against this challenge. n66

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n66 Our consideration of the issue at all may be gratuitous, since petitioners failed to submit timely comment disputing the adequacy of EPA's consideration of economic impacts on small businesses proposed at 63 Fed. Reg. at 1605-07. *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37, 97 L. Ed. 54, 73 S. Ct. 67 (1952) ("Courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.").

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III.

CONCLUSION

We conclude that the EPA's failure to require review of NOIs, which are the functional equivalents of permits under the Phase II General Permit option, and its failure to make NOIs available to the public or subject to public hearings contravene the express requirements of the *Clean Water Act*. We therefore remand these aspects of the Small MS4 General Permit option so that EPA may take appropriate[*123] action to comply with the *Clean Water Act*. We also remand so that EPA may consider in an appropriate proceeding the Environmental Petitioners' contention that § 402(p)(6) requires EPA to regulate

forest roads. We affirm all other aspects of the Phase II Rule against the statutory, administrative, and constitutional challenges raised in this action.

Petitions for Review GRANTED IN PART and DENIED IN PART.

CONCURBY: Richard C. Tallman (In Part)

DISSENTBY: Richard C. Tallman (In Part)

DISSENT:

TALLMAN, Circuit Judge, concurring in part and dissenting in part:

I concur in most of the majority's opinion, but I dissent from Section II.B, which remands the Phase II Rule because its system of general permits is "arbitrary and capricious." I believe EPA's design of a system of general permits supported by notices of intent was a reasonable exercise of EPA's administrative discretion. We must give deference to EPA's interpretation of the laws it is charged with enforcing, so long as EPA's reading of those laws is permissible. Because EPA acted reasonably in designing a National Pollutant Discharge Elimination System ("NPDES") based on general permits and supported by NOIs, I respectfully dissent[*124] from the court's decision to remand this portion of the Phase II Rule.

I

As the majority concedes, we evaluate EPA's interpretation of the *Clean Water Act* with deference. Majority Op. 13796. If Congress's intent is unclear as to whether a system of general permits supplemented by NOIs is allowed, we simply ask "whether EPA's interpretation is permissible." *Ober v. Whitman*, 243 F.3d 1190, 1193 (9th Cir. 2001).

II

As an initial matter, then, we must ask if Congress was clear in its intent concerning the propriety of a system of general permits augmented by NOIs.

Five legislative commands guide this inquiry. First, 33 U.S.C. § 1342(p)(6) charges EPA with creating a system to regulate stormwater discharges. Plainly, nothing in this section speaks to whether EPA may utilize a general permit approach in regulating stormwater discharge.

Second, 33 U.S.C. § 1311(a) makes it illegal to discharge pollutants "except as in compliance" with several sections of the *Clean Water Act*. Again, nothing

in this section addresses whether EPA may make use of general permits reinforced by NOIs.

Third, 33 U.S.C. § 1342[*125] in general (as opposed to the limited charge in *section 1342(p)(6)* discussed above) authorizes EPA to issue NPDES permits, provided that the permits satisfy several conditions. But nothing in *section 1342* prohibits the use of a system of general permits. Fourth,

the Clean Water Act mandates that "a copy of each permit application and each permit issued under" the NPDES permitting program be made available to the public for inspection and photocopying. 33 U.S.C. § 1342(j). *The Act* does not elaborate on this naked requirement. There is no explanation of the manner in which NPDES permits and applications are to be made publicly available. Nor does the *Act* define what constitutes a "permit" that would trigger these requirements.

And fifth, the *Clean Water Act* authorizes the issuance of an NPDES "permit" "after opportunity for public hearing." 33 U.S.C. § 1342(a)(1). *The Act* does not provide a definition of "permit," nor does it further detail what triggers the requirement of a public hearing.

In short, the *Clean Water Act* fails to address the propriety of a general permit system, or whether NOIs ought to be considered "permits." Therefore, [*126]we should uphold EPA's creation of a system of general permits buttressed by NOIs so long as it is "permissible." See *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843-44, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). Our duty to defer to EPA in such a situation is based on sound policy. Given the overwhelming challenge and complexity of the programs administered by federal agencies today, it is sensible to trust agencies with the design of those programs so long as the programs are reasonable interpretations of congressional mandates.

The central issues regarding EPA's general permit system are whether the *Clean Water Act* allows such a system and whether NOIs should be considered "permits." The resolution of these issues requires a complicated weighing of policies (e.g., administrative streamlining vs. robust inquiry) that is precisely what agencies are designed to do and courts are without the resources or expertise to do. "If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction." *Chevron*, 467 U.S. at 843.[*127]

III

The Phase II Rule promulgates a system of general permits. EPA contemplated that these general permits will be issued on a watershed basis, with individual stormwater dischargers then filing NOIs to operate under general permits. The federal regulations implementing this system repeatedly emphasize that "the use of general permits, instead of individual permits, reduces the administrative burden of permitting authorities, while also limiting the paperwork burden on regulated parties." 64 *Fed. Reg.* 68,722, 68,737, 68,762 (Dec. 8, 1999).

The use of a general permit system for the administration of the NPDES system has been considered and approved before. In *NRDC v. Costle*, 186 U.S. App. D.C. 147, 568 F.2d 1369 (D.C. Cir. 1977), the District of Columbia Circuit considered a challenge to EPA's regulations under the *Federal Water Pollution Control Act*, which was the precursor to the *Clean Water Act*. In *Costle*, EPA sought approval of its design for the NPDES system. EPA had issued regulations exempting broad categories of point sources from the requirement that an NPDES permit be obtained before discharging into federal waters. Part of EPA's rationale in creating the exempted[*128] categories was that otherwise EPA would be overwhelmed by the administrative burden of issuing NPDES permits. 568 F.2d at 1377-79. The *Costle* court affirmed the lower court's rejection of these exemptions because the legislation in question plainly required that all point sources obtain some kind of NPDES permit. *Id.* But in rejecting EPA's regulations, the *Costle* court discussed the options available to EPA in promulgating an NPDES system that was considerate of the enormous burden such a system could impose on EPA. *Id.* at 1380-81. In particular, the court recommended "the use of area or general permits. *The Act* allows such techniques. Area-wide regulation is one well-established means of coping with administrative exigency." *Id.* at 1381 (emphasis added).

Against this backdrop, EPA's creation of a general permit system was entirely permissible. And if the creation of a general permit system is permissible, then it does not matter whether NOIs are given a public airing.

The majority contends that the general permit system prevents EPA from fulfilling its duty to make sure that municipalities do not discharge pollutants in violation of the *Clean Water Act*. *The* [*129] majority reasons that by failing to require EPA review of NOIs, the Rule fails to ensure that a regulated MS4's stormwater pollution control program will satisfy the *Clean Water Act* requirement that the MS4 "reduce discharges to the maximum extent practicable." Majority Op. 13800. But the majority's analysis ignores the effects of the general permit. By filing an NOI, a discharger obligates itself to comply with the limitations and controls imposed by the

general permit under which it intends to operate. EPA mandates that all permits (including general permits) condition their issuance on satisfaction of pollution limitations imposed by the *Clean Water Act*. 40 C.F.R. § 122.44. In particular, EPA requires permits to satisfy the restrictions imposed by *Clean Water Act section 307(a)*. Id. at § 122.44(b)(1). Therefore, the general permit imposes the obligations with which the discharger must comply (including applicable *Clean Water Act* standards), and EPA's decision not to review every NOI is not a failure to insure compliance with the *Clean Water Act*.

The majority also objects to EPA's general permit system because it fails to allow for sufficient public[*130] participation in the NOIs. Majority Op. 13802-05. The majority's position fails to give deference to EPA and imposes the majority's own wishes instead. EPA would have been justified in creating a system

entirely reliant on general or area permits. Its imposition of NOIs is an indulgence to certain policy prerogatives, namely public involvement and the collection of additional information. But the power to create a general permit system necessarily implies the power to require subordinate steps for NOIs that do not quite reach the level of inquiry associated with actual permits.

IV

We function as an adjudicator of disputes, not as a policy-making body. Where an agency promulgates rules after a deliberative process, it is incumbent upon us to respect the agency's decisions or else risk trivializing the function of that agency. In this case, EPA made a permissible decision to create a general permit program supported by NOIs. Therefore, I respectfully dissent from Section II.B of the majority's opinion.